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In The

Supreme Court of the United States

GARRICK TURNER,

Petitioner,

vs.

STATE OF CONNECTICUT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In determining whether a defendant was "in custody" when he gave an unwarned confession to the police, may the court consider the age and inexperience of the defendant?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Garrick Turner, petitions for a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of Connecticut.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Connecticut was rendered on January 20, 2004, and was published at 267 Conn. 414, 838 A.2d 947. It is printed as Appendix A to this petition. The opinion of the Connecticut Appellate Court which was reversed by the Connecticut Supreme Court was rendered on January 29, 2002, and was published at 67 Conn. App. 708, 789 A.2d 1058. It is printed as Appendix B to this petition.

JURISDICTION

The Connecticut Supreme Court rendered its decision on the petitioner's appeal on January 20, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person . . . shall be . . . compelled in any criminal case to be a witness against himself. . . ."

Section 53a-71(a) of the Connecticut General Statutes provides in relevant part: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person. . . . "

Section 54-94a of the Connecticut General Statutes provides in relevant part: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion . . . to suppress statements and evidence based on the involuntariness of a statement . . . , the defendant after the imposition of sentence may file an appeal within the time prescribed by law."

STATEMENT OF THE CASE

The Petitioner, Garrick Turner, was an eighteen year old high school student who had been living in the United States for only two years and had never been arrested. A police detective telephoned the defendant and told him that he should come to police headquarters for questioning in connection with an ongoing investigation, and that if he did not do so the police would embarrass him by coming to his school. The next day, accompanied by his father and his aunt, he went to police headquarters, where he was interrogated by the detective for thirty to forty minutes. He was told that he was free to leave, but was asked questions implicating him in a sexual assault and was told that the police were gathering evidence relating to that

crime. It is undisputed that he was never told that he had a right to remain silent and a right to counsel and that his statements could be used against him. During the questioning, he admitted having had sexual relations on two occasions with his fifteen year old girlfriend.

The Petitioner was arrested and charged with Sexual Assault in the Second Degree, a Class B felony. He moved to suppress his confession on the ground that it was given without warning him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The trial court denied the motion on the ground that the Petitioner was not in custody at the time of his confession. The Petitioner thereupon entered a plea of guilty to the crime charged.

Prior to sentencing, the Petitioner retained new counsel and moved to vacate his guilty plea. Connecticut law permits a defendant in a criminal case to plead and reserve the right to challenge on appeal the denial of a motion to suppress a confession, but only if the plea is a plea of *nolo contendere* and not a plea of guilty. Petitioner argued that in failing to advise him of the distinction, and in advising him to plead guilty and not *nolo contendere*, his first attorney had rendered ineffective assistance of counsel. The trial court denied that motion, holding that reasonable jurists could not conclude that the Petitioner was in custody at the time of his confession, and that therefore *Miranda* warnings were not required.

The Petitioner appealed to the Connecticut Appellate Court from the ruling denying his motion to vacate his plea of guilty. The Connecticut Appellate Court unanimously reversed the Petitioner's conviction, holding that his claim that he was in custody at the time of his confession was not frivolous and that he should be afforded the

right to challenge on appeal the denial of his motion to suppress.

The State of Connecticut thereupon appealed by petition for certification to the Connecticut Supreme Court. The Connecticut Supreme Court, with Chief Justice Sullivan dissenting, reversed the Appellate Court and reinstated the Petitioner's conviction, holding as a matter of law that the Petitioner was not in custody at the time he confessed and that reasonable jurists could not conclude otherwise. The Connecticut Supreme Court held that the Petitioner's age, inexperience and status as a recent immigrant were not appropriate considerations in determining whether he was in custody, reasoning that considering such factors would make the test of custody a subjective rather than objective "reasonable person" test. That court thereupon stayed execution of the judgment pending a petition to this court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

In Determining Whether A Suspect Is In Custody For Purposes Of Providing *Miranda* Warnings Before Interrogation, The Court Should Be Permitted To Consider The Suspect's Youth And Inexperience

This court presently has before it the case of *Yarborough v. Alvarado*, ___ U.S. ___, 124 S. Ct. 45, 156 L. Ed. 2d 703 (2003), in which certiorari was granted to review a question similar to that presented here. As noted in Chief Justice Sullivan's dissenting opinion in the present case, the Ninth Circuit in that case had ruled that the age (seventeen) of the suspect was an appropriate consideration in deciding whether his unwarned interrogation

occurred in a custodial setting. *Alvarado v. Hickman*, 316 F.3d 841 (9th Cir. 2002). Alvarado was one year younger than the Petitioner in this case, but the Petitioner here was a recent immigrant without any prior experience with the criminal justice system. Chief Justice Sullivan concluded, as did all three of the judges of the Connecticut Appellate Court who considered this case, that these factors should be considered in making the objective determination whether a person *in the accused's position* would have considered himself free to leave even if the interrogating officer had told him that he was.

Also as noted by Chief Justice Sullivan, two state courts also have held that the age and background of an accused are factors which may be considered in making the objective determination whether a person in his position would have believed that he was in custody. *People v. Savory*, 105 Ill. App. 3d 1023, 1028, 435 N.E.2d 226 (1982); *State v. Smith*, 546 N.W.2d 916, 923 (Iowa 1996).

There is nothing inconsistent with this court's holding in *Oregon v. Mathiason*, 429 U.S. 492 (1977), in the position taken by Chief Justice Sullivan, the Connecticut Appellate Court, and the Petitioner here. Nobody argues that the age and inexperience of an accused are in any way *dispositive* of the custody issue. It is argued only that courts are *not precluded* from *considering* these factors, like many others, in deciding whether a person in the accused's position would, viewed objectively, have felt himself not free to leave the interrogation room.

Because trial judges should not have their hands so tied in deciding suppression motions that they cannot consider the factual realities of the cases before them,

certiorari should be granted to review the ruling of the Connecticut Supreme Court in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

State of Connecticut vs. Garrick Turner

267 Conn. 414, 838 A.2d 947 (2004)

App. 1

Supreme Court of Connecticut

STATE OF CONNECTICUT *v.* GARRICK TURNER
(SC 16711)

Sullivan, C.J., and Borden, Katz, Palmer and Vertefeuille, Js.

Michele C. Lukban, assistant state's attorney, with whom, on the brief, were *Jonathan C. Benedict*, state's attorney, and *Joseph Harry*, senior assistant state's attorney, for the appellant (state).

Carlton L. Hume, with whom were *Tony Jorgensen* and, on the brief, *Tina J. Georgiades*, for the appellee (defendant).

Opinion

BORDEN, J. The state appeals, following our grant of certification, from the judgment of the Appellate Court reversing the defendant's conviction, rendered following a guilty plea, of sexual assault in the second degree and risk of injury to a child. The state claims that the Appellate Court improperly concluded that the defendant's guilty plea resulted from ineffective assistance of counsel. We reverse the judgment of the Appellate Court.

The defendant, Garrick Turner, was charged with sexual assault in the second degree in violation of General Statutes § 53a-71 (a)(1), and risk of injury to a child in violation of General Statutes (Rev. to 1997) § 53-21(1).[1]

[1] General Statutes § 53a-71(a) provides in relevant part: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other

(Continued on following page)

Prior to trial, the defendant filed a motion to suppress a statement that he had made to the police, claiming that he had not been informed of his *Miranda*[2] rights. Following an evidentiary hearing, the trial court, *Turner, J.*, denied the defendant's motion, and the defendant subsequently pleaded guilty to all charges. Thereafter, the defendant filed a motion to withdraw and vacate his guilty plea, claiming that he had received ineffective assistance of counsel. The trial court, *B. Kaplan, J.*, denied the defendant's motion to withdraw his plea and rendered a judgment of conviction in accordance with the guilty plea.

On appeal to the Appellate Court, the defendant claimed that he had been denied due process of law due to ineffective assistance of counsel because his attorney had not informed him of the possibility of entering a conditional plea of nolo contendere pursuant to General Statutes (Rev. to 1999) § 54-94a[3] and Practice Book

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person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person. . . ."

General Statutes (Rev. to 1997) § 53-21 provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered . . . or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of a class C felony."

[2] See *Miranda* v. *Arizona*, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[3] General Statutes (Rev. to 1999) § 54-94a provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress evidence based on an unreasonable search or seizure, motion to suppress statements and evidence based on the involuntariness of a statement or motion to dismiss, the defendant after the imposition of sentence may file an

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§ 61-6,[4] thereby preserving the right to appeal from the denial of his motion to suppress. The Appellate Court reversed the judgment of the trial court, concluding that, due to ineffective assistance of counsel, the defendant's guilty plea had not been entered knowingly and voluntarily because he had not understood "that a guilty plea, unlike a nolo plea, would waive his right to appeal" from the denial of his motion to suppress. *State* v. *Turner*, 67 Conn. App. 708, 715, 789 A.2d 1058 (2002). Accordingly, the Appellate Court held that the "[trial] court abused its

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appeal within the time prescribed by law. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

[4] Practice Book § 61-6(a)(2)(i) provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's (a) motion to suppress evidence based on an unreasonable search or seizure, (b) motion to suppress statements and evidence based on the involuntariness of a statement, (c) or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law. The issue to be considered in such appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this subsection shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution. The court shall not accept a nolo contendere plea pursuant to this subsection where the denial of the motion to suppress would not have a significant impact upon the disposition of the case in the trial court. The court shall also decline to accept such a nolo contendere plea where the record available for review of the denial of the motion to suppress or motion to dismiss is inadequate for appellate review of the court's determination thereof."

discretion in denying the defendant's motion to vacate his guilty plea." Id., 715-16. This certified appeal followed.[5]

The underlying facts and procedural history were set forth in the opinion of the Appellate Court. "On March 8, 1998, the defendant went to the Bridgeport police station. His father had received a telephone call the day before from Mark McDaniel, a sergeant, requesting to speak to the defendant. The defendant was eighteen years old, had no prior criminal history and had been living in the United States for only two years. The defendant resided with his father, who, along with the defendant's aunt, accompanied him to the police station.

"At the station, McDaniel questioned the defendant alone. The interrogation lasted about thirty to forty minutes, three to four minutes of which were recorded.[6]

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[5] We granted the state's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly conclude that the defendant's guilty plea resulted from ineffective assistance of counsel?" *State* v. *Turner*, 260 Conn. 905, 795 A.2d 546 (2002).

[6] The transcript of the defendant's recorded police interview provides as follows: "Today's date is December 12, 1998. The time is 3:03 P.M. This is Detective McDaniel.

"Q. Can you please state you name?

"A. Garrick Turner.

"Q. How old are you Garrick?

"A. I'm eighteen.

"Q. What's your date of birth?

"A. January 2, 19[80].

"Q. Do you know why you're here today Garrick?

"A. Yeah.

"Q. You know that you're free to leave and you're not under arrest, right?

(Continued on following page)

"A. Yeah.

"Q. And you haven't been coerced or forced to come down here to speak to me at all, have you?

"A. No.

"Q. You want to tell me what your relationship [is] with [the victim]?

"A. Uh, we've been girlfriend and boyfriend.

"Q. For how long?

"A. For a year, almost a year.

"Q. And have you had a relationship with [the victim]?

"A. Yes.

"Q. What exactly do you mean by a relationship? Did you have sex with her?

"A. Yeah.

"Q. When did you have sex with her?

"A. Uh, March.

"Q. March. What year? This year? March of [19]98?

"A. Yeah.

"Q. Where did this occur?

"A. Uh, at my house.

"Q. At your house, where's your house?

"A. Uh, 303 Garfield Avenue.

"Q. Where in the house, in your room, in the living room?

"A. In the bathroom.

"Q. In the bathroom? And, how many times did this happen?

"A. Twice.

"Q. Twice? In the month of March?

"A. Yes.

"Q. Okay. And, have you talked to her since then?

"A. Yeah, I've talked to her since then.

"Q. Did you know how old she was at the time?

"A. Yeah.

"Q. How old was she?

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McDaniel asked the defendant if he had engaged in sexual intercourse with the victim and [if so] when that had occurred. The defendant responded that he had engaged in sexual intercourse with the victim two times in March,

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"A. She was fifteen.

"Q. Fifteen. And, what's your relationship with her now?

"A. Uh, we still talk you know, so, we're still girlfriend and boyfriend.

"Q. When's the last time she called you?

"A. Last night.

"Q. Last night, what time?

"A. Around eight or nine.

"Q. Eight or nine? And what did she say?

"A. She said she was checking up on me, seeing what I was doing.

"Q. Who was home? Was there anyone home when this happened at your house?

"A. I was downstairs on the first floor with my cousin. We were watching tv.

"Q. No, when you had sex with her in March.

"A. Uh, yeah, my cousins were home and my aunts. One of my aunt's [was] home.

"Q. Did they know that you were in the bathroom. How did you get in there without them seeing you?

"A. I just sneaked in.

"Q. Okay. Do you have anything else you'd like to add to this statement?

"A. No, that's it.

"Q. You swear that what you've told me in this statement is the truth?

"A. Yes.

"This statement ends on December 8, 1998. Time is 3:06 P.M."

1998, when the victim was fifteen years old.[7] The defendant was subsequently charged with sexual assault in the second degree and risk of injury to a child.

"Before entering his guilty plea, the defendant filed a motion to suppress his statement to the police, and an evidentiary hearing followed. The defendant's counsel called the defendant as his only witness. The defendant claimed that his statement to the police was inadmissible because he had been interrogated at the police station, under circumstances from which it could be inferred that he was in custody, without having been notified of his rights under *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

"At the hearing, McDaniel admitted that he did not read the defendant *Miranda* warnings because the defendant was neither under arrest nor in custody. He testified that he told the defendant several times during the interrogation that he was free to leave and that he was not under arrest.[8] McDaniel further testified that he did not threaten the defendant or pressure him into making his statement. The [trial] court concluded that the defendant failed to sustain his burden of proving that he was in custody at the time of the interview and therefore denied the motion to suppress. Thereafter, the defendant pleaded

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[7] It is undisputed that, at the time of the sexual intercourse, the victim was less than sixteen years of age and the defendant was more than eighteen years of age.

[8] Although the Appellate Court opinion does not refer to it, the record also discloses that the defendant testified that McDaniel had told him several times that he was free to leave.

guilty to the charges of sexual assault in the second degree and risk of injury to a child.[9]

"On June 14, 2000, prior to sentencing, the defendant filed a motion to vacate and to withdraw his guilty plea on the ground that his trial counsel was ineffective in failing to inform him that by pleading guilty, he was waiving his right to appeal from the court's denial of his motion to suppress. See Practice Book § 39-27(4). The defendant requested the withdrawal of his plea so that he could enter a new plea of nolo contendere in accordance with General Statutes [Rev. to 1999] § 54-94a and thereby preserve his right to appeal from the denial of his motion to suppress. The [trial] court denied the motion to withdraw on the ground that the defendant had not demonstrated ineffective assistance of counsel.[10] The court sentenced the

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[9] The record discloses that the defendant's trial was scheduled to begin shortly because jury selection had already begun at the time of the defendant's plea hearing. In exchange for the defendant's plea of guilty, for which the maximum sentence could have been twenty years imprisonment, the state recommended an effective sentence of ten years imprisonment, execution of which would be suspended after the nine month mandatory minimum, including ten years probation, registration as a sex offender, no contact with the victim, and sexual offender treatment. After the court canvassed the defendant, defense counsel stated that the defendant understood that his plea put him in severe jeopardy, and that he was pleading guilty because of the risk of being sentenced to a longer term of incarceration.

[10] The record also discloses that, in the time between his guilty plea and his sentencing hearing, the defendant retained new counsel. At the sentencing hearing, in support of the defendant's motion to withdraw his plea, the defendant's new counsel represented that he had spoken with the defendant's prior counsel and had learned that the prior counsel had not discussed with the defendant the prospect of entering a plea under § 54-94a because prior counsel believed that appealing the ruling on the motion to suppress would have been

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defendant to a total term of incarceration of ten years, execution suspended after nine months, and ten years conditional probation in accordance with the state's recommended sentence offered pursuant to its [guilty] plea agreement with the defendant. The defendant's appeal [to the Appellate Court] followed." *State* v. *Turner*, supra, 67 Conn. App. 709-11.

On appeal to the Appellate Court, the defendant claimed that his guilty plea had been the result of ineffective assistance of counsel because he had not been informed of his "statutory right" to plead nolo contendere, thereby preserving his right to appeal from the trial court's denial of his motion to suppress. Id., 711. In response, the state claimed that his counsel's failure to inform the defendant of his right to appeal did not amount

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frivolous. For that reason, the defendant's counsel argued, the prior counsel's performance had been ineffective because he should have consulted with the defendant regarding the ability to appeal his motion to suppress. In response, the state argued that, even if the defendant had prevailed on his motion to suppress, the state was nonetheless ready to proceed to trial with the victim as its central witness. Thus, in the state's view, § 54-94a was inapplicable to this case because the defendant's appeal would not have been "dispositive" of the case. In reply, the defendant's counsel opined that "we don't know whether or not [the victim] would actually come in and testify." Thus, the defendant's counsel asserted, without the victim's testimony, and without the defendant's statement made to the police, the state's case would have been weak and, therefore, a successful appeal on his motion to suppress would have been dispositive. The trial court denied the defendant's motion, stating that it was familiar with the case and found the prior counsel to have been competent at all times. The court concluded, moreover, that a conditional plea of nolo contendere was inappropriate in this case because the trial was scheduled to begin shortly and the victim was expected to testify, meaning that the defendant's appeal would not have been "dispositive" of the case as required by § 54-94a.

to ineffective assistance counsel because any appeal from the trial court's motion to suppress would have been frivolous. Id., 714. The Appellate Court concluded that it was "possible that [the defendant] might have prevailed on his claim that his *Miranda* rights were violated because he believed he was in custody due to his inexperience with the criminal system." Id. Accordingly, the Appellate Court held that, because "the defendant had nonfrivolous grounds for an appeal," defense counsel's failure to inform the defendant "of his statutory right to plead nolo contendere" constituted ineffective assistance of counsel in accord with this court's holding in *Ghant* v. *Commissioner of Correction*, 255 Conn. 1, 9, 761 A.2d 740 (2000). *State* v. *Turner*, supra, 67 Conn. App. 714. The Appellate Court remanded the case to the trial court "with direction to vacate the guilty plea, to accept the defendant's plea of nolo contendere pursuant to § 54-94a and to render judgment thereon." Id., 716. Additional facts will be presented as necessary.

On appeal to this court, the state claims that the Appellate Court improperly concluded that defense counsel had been ineffective for failing to consult with the defendant about the prospect of entering a conditional plea of nolo contendere under § 54-94a. Specifically, the state argues that, because the defendant was not in custody for *Miranda* purposes, any appeal from the trial court's denial of his motion to suppress would have been frivolous. Thus, the state contends, because the defendant had no nonfrivolous grounds for an appeal, defense counsel was not ineffective for failing to consult with the defendant regarding

whatever appellate rights § 54-94a would have preserved. We agree.[11]

We first turn to a brief review of the law governing pleas of nolo contendere conditional on the right to appeal as set forth in § 54-94a and Practice Book § 61-6. Central to that review is the notion that, at the time of the trial court proceedings in the present case, a plea of nolo contendere conditioned on the defendant's right to take an appeal was, unlike a guilty plea, subject to the determination of the trial court that its ruling on the motion at issue would "have a significant impact upon the disposition of the case in the trial court. . . ." Practice Book § 61-6(a)(2)(i); see footnote 4 of this opinion. In this connection, we note that § 54-94a was enacted in 1982 by No. 82-17 of the 1982 Public Acts and has been amended twice; once in 1988 by No. 88-19 of the 1988 Public Acts, and again in 2001 by No. 01-13 of the 2001 Public Acts. Practice Book § 61-6 was originally adopted in 1986 as § 4003, and although the rule was designed to implement the statute, it contains language slightly different from that used in

[11] This conclusion makes it unnecessary to reach the merits of the state's other arguments, namely, that: (1) the defendant has not met his burden of establishing an adequate factual basis to prevail on a claim of ineffective assistance of counsel; (2) the defendant did not have a "statutory right" to plead nolo contendere in this case because his appeal from the trial court's denial of his motion to suppress would not have been dispositive of the case and, therefore, trial counsel was not required to inform the defendant of the possibility of entering such a plea; and (3) the Appellate Court improperly concluded that the defendant's guilty plea was neither knowing nor intelligent because the trial court's plea canvass was sufficient as a matter of law.

§ 54-94a.[12] See footnotes 3 and 4 of this opinion. Because the defendant attempted to withdraw his guilty plea on June 14, 2000, we evaluate his claim in light of the statute and rule of practice as they existed as of that date.

By enacting § 54-94a, the "legislature in 1982 *altered* the broad waiver of constitutional rights implicit in a plea of guilty or nolo contendere. . . . Section 54-94a is intended to promote judicial economy by allowing the parties to litigate a suppression or dismissal issue fully in the trial court, and thereafter allowing the defendant to obtain review of an adverse ruling without the parties' or the court's expending additional resources." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Piorkowski,* 236 Conn. 388, 402, 672 A.2d 921 (1996). In 1985, this court interpreted § 54-94a strictly and directed trial courts "not [to] employ this procedural innovation except in situations plainly within [its] provisions. . . . " *State* v. *Madera,* 198 Conn. 92, 102, 503 A.2d 136 (1985). We noted, moreover, that "[t]he conditional plea is susceptible to abuse . . . unless its use is carefully limited to significant issues the determination of which on appeal is *likely to be dispositive of the case.*" (Emphasis added.) Id., 101.

For those policy reasons, Practice Book § 61-6, then § 4003, was adopted in 1986 and limited the scope of

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[12] Of particular relevance to this appeal is the fact that Practice Book § 61-6(a)(2)(i) added the following additional language, which is not contained in § 54-94a: "The court shall not accept a nolo contendere plea pursuant to this subsection where the denial of the motion to suppress *would not have a significant impact upon the disposition of the case in the trial court.*" (Emphasis added.)

§ 54-94a by stating, among other things, that a court should not accept the conditional nolo plea if the issue on appeal "would not have a *significant impact upon the disposition of the case* in the trial court." (Emphasis added.) See *State* v. *Piorkowski,* supra, 236 Conn. 416 ("[t]he rule, designed to implement the statute, is more limited than the statute, and cannot be read to expand it"). In *Piorkowski,* however, we rejected the state's contention that "'significant impact'" was synonymous with "fully dispositive." Id., 414-15. The state had argued in *Piorkowski* that, because Practice Book § 4003, now § 61-6, is patterned after rule 11 of the Federal Rules of Criminal Procedure, conditional pleas are available only "when the decision of the [reviewing] court . . . will dispose of the case either by allowing the [conviction] to stand or by such action as compelling dismissal of the indictment or suppressing essential evidence." (Internal quotation marks omitted.) *State* v. *Piorkowski,* supra, 414. We disagreed, and held that Practice Book § 4003, now § 61-6, imposed a less stringent standard than does rule 11, although we did not go on to define precisely that standard; rather, we merely stated that "the standard is looser than the state suggests." Id., 420. Thus, at the time the defendant attempted to withdraw his guilty plea in the present case, after *Piorkowski* had been decided in 1996, but before § 54-94a was amended in 2001, a trial court could accept a conditional plea of nolo contendere so long as the issue on appeal would have a significant impact on the outcome of the case.[13]

[13] Section 54-94a was amended in 2001, and explicitly added language requiring that the motion to suppress "be dispositive of the

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We next turn to a brief review of the law governing claims of ineffective assistance of counsel. "Almost without exception, we have required that a claim of ineffective assistance of counsel must be raised by way of habeas corpus, rather than by direct appeal, because of the need for a full evidentiary record for such [a] claim." (Internal quotation marks omitted.) *State* v. *Vega*, 259 Conn. 374, 385, 788 A.2d 1221, cert. denied, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002). "*Absent the evidentiary hearing available in the collateral action, review in this court of the ineffective assistance claim is at best difficult and sometimes impossible.* The evidentiary hearing provides the trial court with the evidence which is often necessary to evaluate the competency of the defense and the harmfulness of any incompetency." (Emphasis in original; internal quotation marks omitted.) *State* v. *Colton*, 234 Conn. 683, 697, 663 A.2d 339 (1995), cert. denied, 516 U.S. 1140, 116 S. Ct. 972, 133 L. Ed. 2d 892 (1996).

Practice Book § 39-27(4) provides an explicit exception to this general rule, however, and allows a defendant to withdraw a guilty plea after its acceptance if the "plea resulted from the denial of effective assistance of counsel. . . . "[14] We recognize, therefore, that the defendant's

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case." Public Acts 2001, No. 01-13. Thus, the standard in place today is stricter than the standard set forth in *Piorkowski*.

[14] Practice Book § 39-27 provides in relevant part: "The grounds for allowing the defendant to withdraw his or her plea of guilty after acceptance are as follows . . .

"(4) The plea resulted from the denial of effective assistance of counsel. . . ."

claim of ineffective assistance of counsel is procedurally correct. Nevertheless, we are mindful that "on the rare occasions that we have addressed an ineffective assistance of counsel claim on direct appeal . . . we have limited our review" to situations in which "the record of the trial court's allegedly improper action was adequate for review or the issue presented was a question of law, not one of fact requiring further evidentiary development." *State* v. *Crespo,* 246 Conn. 665, 688, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999). We point out, finally, that irrespective of whether a defendant proceeds by way of habeas corpus or direct appeal, our review is the same, and the burden remains on the defendant to produce an adequate record so that an appellate court may ascertain whether counsel's performance was ineffective.

As the foregoing discussion indicates, in order to establish that the defendant's prior counsel's assistance was ineffective for failing to advise him of the availability of a conditional plea under § 54-94a, the defendant was required to establish, as a threshold factual matter, that the trial court would have accepted such a plea. This, in turn, would have required the defendant to establish that: (1) the victim would not have testified against him; and (2) the denial of his motion to suppress would have had a significant impact on the case. See footnote 10 of this opinion. Although we have doubts about those matters, we assume without deciding that the defendant, in fact, made those requisite showings to the trial court.[15] We conclude,

[15] The dissent acknowledges that the record does not establish that the trial court would have accepted a conditional plea of nolo contendere,

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nonetheless, that the defendant has failed to establish ineffective assistance of counsel in this case, because the defendant has failed to establish that he had nonfrivolous grounds to appeal from the trial court's denial of his motion to suppress.

It is well settled that claims of ineffective assistance of counsel are governed by the United States Supreme Court's two-pronged test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, a "defendant must show: (1) that counsel's representation fell below an objective standard of reasonableness . . . and (2) that defense counsel's deficient performance prejudiced the defense." (Citation omitted.)

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yet concludes that such an oversight "does not prevent me from considering whether the failure of the defendant's prior counsel at least to notify the defendant of the possibility of pleading nolo contendere constituted ineffective assistance of counsel." See footnote 2 of the dissenting opinion. As the following discussion makes clear, however, this conclusion ignores a basic maxim regarding claims of ineffective assistance of counsel, namely, that a defendant must establish that counsel's "deficient performance prejudiced the defense." *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Put another way, in order to prevail on a claim of ineffective assistance of counsel, a defendant must show actual harm. In the present case, the defendant is claiming that counsel's performance prevented him from entering a plea under § 54-94a; he has not claimed, as the dissent suggests; see footnote 2 of the dissenting opinion; that he would have pleaded not guilty and gone to trial if a nolo plea had not been available to him. In order to show actual harm, therefore, the defendant must show that, but for counsel's deficient performance, he would have entered a plea under § 54-94a, which, in turn, requires him to show that the court would have accepted such a plea. Without such a showing, the defendant cannot prevail on a claim of ineffective assistance of counsel. Because the dissent fails to undertake that issue, it lacks a fundamental predicate.

Copas v. *Commissioner of Correction,* 234 Conn. 139, 154, 662 A.2d 718 (1995). In the realm of plea negotiations, in order to satisfy the second prong of *Strickland,* namely, proving actual harm, a defendant must show that, but for the counsel's "deficient performance, the outcome of the plea process would have been different." Id., 156.

In the context of whether counsel has a duty to advise a defendant of his right to take an appeal, we are guided by *Ghant* v. *Commissioner of Correction,* supra, 255 Conn. 9, in which we held that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing."[16] (Internal quotation marks omitted.) The crux of the defendant's claim is that, because of his counsel's failure to advise him about the possibility of entering a conditional plea of nolo contendere, he was deprived of an opportunity to appeal from the trial court's denial of his motion to suppress. By analogy then, because *Ghant* establishes when counsel has a duty to advise a defendant of his right to appeal, and because § 54-94a preserves, albeit in limited circumstances, a defendant's right to appeal, *Ghant* similarly establishes when counsel has a duty to advise a defendant of the prospect of entering a plea under § 54-94a. In the context of the present case, therefore, the defendant must

[16] This prong of *Ghant* is inapposite to the present case because the defendant has not claimed that he told his counsel that he was interested in appealing.

establish that there were nonfrivolous grounds for an appeal. This requires, moreover, that we define the standard for evaluating the frivolousness of an appeal in this procedural context.

We previously have defined the frivolousness of an appeal in two contexts. First, in the context of whether to impose sanctions on an attorney for filing a frivolous appeal, we adopted the standard set forth in the official commentary to rule 3.1 of the Rules of Professional Conduct, which states that an "action is frivolous . . . if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." (Internal quotation marks omitted.) *Texaco, Inc.* v. *Golart,* 206 Conn. 454, 464, 538 A.2d 1017 (1988).

Second, in the context of evaluating whether a court has abused its discretion in denying requests for certification or permission to appeal, we repeatedly have applied the criteria set forth in *Lozada* v. *Deeds,* 498 U.S. 430, 432, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991). See, e.g., *State* v. *James,* 261 Conn. 395, 405-10, 802 A.2d 820 (2002) (denial of state's request for permission to appeal from court's ruling that police lacked probable cause to arrest); *Seebeck* v. *State,* 246 Conn. 514, 534, 717 A.2d 1161 (1998) (denial of request for certification to appeal from denial of petition for new trial); *Simms* v. *Warden,* 230 Conn. 608, 616, 646 A.2d 126 (1994) (denial of petition for certification to appeal from denial of writ of habeas corpus). "The *Lozada* inquiry was established in order to determine whether a petitioner has made the requisite 'substantial showing of

the denial of a federal right' for the issuance of the required certificate of probable cause to appeal the denial of federal habeas relief. . . . In *Lozada,* the United States Supreme Court held that the required 'substantial showing' was made if the petitioner 'demonstrate[s] *that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.*' . . . In the federal courts, the probable cause certificate serves the same policy goal as the granting of permission or certification to appeal does in Connecticut, namely, to screen out frivolous appeals while still protecting the litigants' statutory right to appellate review of adverse determinations." (Citations omitted; emphasis added.) *State* v. *James,* supra, 404.

We first applied the *Lozada* criteria in evaluating the frivolousness of an appeal in *Simms* v. *Warden,* supra, 230 Conn. 616, in which we held that, in an appeal under General Statutes § 52-470(b), which governs denials of requests for certification to appeal an adverse habeas corpus ruling, "a petitioner will establish a clear abuse of discretion . . . if he can demonstrate the existence of one of the *Lozada* criteria. . . . " We reasoned that, because the legislature had intended to discourage frivolous appeals when it enacted § 52-470, a "habeas appeal that satisfies one of the *Lozada* criteria is not frivolous." Id.

Following our reasoning in *Simms,* we subsequently held that the *Lozada* criteria was the proper standard with which to evaluate an abuse of discretion under General Statutes § 54-95, which governs requests for certification to appeal a denial of a petition for a new trial or writ of error. *Seebeck* v. *State,* supra, 246 Conn. 533-34. In a similar fashion, we held that the *Lozada* criteria was

appropriate in evaluating an abuse of discretion in which the state sought permission to appeal under General Statutes § 54-96. *State* v. *James,* supra, 261 Conn. 405-10. Thus, *Simms, Seebeck* and *James* make clear that when a petitioner presents an issue on appeal that satisfies any one of the *Lozada* criteria, that petitioner ought to have that issue considered on appeal.

We see no reason why the *Lozada* criteria similarly should not be used for evaluating the frivolousness of an appeal on a defendant's claim, whether by way of habeas corpus or direct appeal via Practice Book § 39-27(4),that counsel was ineffective for failing to consult with him regarding an appeal. First, this situation is legally analogous to those in which we already have applied the *Lozada* criteria. If a court has not abused its discretion in denying a petition for certification to appeal because the appeal is frivolous under *Lozada,* then it logically follows that counsel would not be ineffective for failing to inform a defendant of his right to appeal if that appeal would be frivolous. Second, the *Lozada* criteria, as previously discussed, is consistent with our policy of discouraging frivolous appeals, which is equally applicable in this context in which a defendant is seeking relief for counsel's failure to consult about appellate rights. Finally, the standard of frivolousness that was adopted in *Texaco, Inc.,* which deals with attorney misconduct, is inapplicable to the present case because its purpose is to evaluate whether an attorney should be sanctioned, not whether a convicted criminal defendant has been denied an otherwise valid avenue to a judicial appellate remedy.

Bolstering our conclusion is the fashion in which we rejected the petitioner's claims as frivolous in *Ghant.* Indeed, for each of the petitioner's five claims in *Ghant,* we

stated the claim, followed by the applicable well settled law, and upon an application of the law to the facts of the case, we concluded that each claim did "not constitute a nonfrivolous ground for appeal." *Ghant* v. *Commissioner of Correction,* supra, 255 Conn. 11-17. In other words, we merely concluded that counsel's performance could not have been ineffective as a matter of law because the petitioner failed to present any claims that established even a remote likelihood of success under those well settled rules of law. Thus, the standard used in *Ghant* very much resembled the *Lozada* criteria, although we did not explicitly say so at the time.

We are mindful that this standard allows counsel some discretion in whether to consult with a defendant about an appeal. Indeed, it presumes that counsel is aware of well settled law and may, in his or her best judgment, decide in which circumstances it is appropriate to pursue an appeal on behalf of his or her client. The opposite conclusion, however, would oblige attorneys to ignore well settled law and common sense in an effort to exhaust a defendant's appellate remedies – all for the singular purpose of avoiding a later claim of ineffectiveness. The *Lozada* set of criteria sets forth a desirable standard in this context, because it balances those situations in which a defendant has been unconstitutionally deprived of a right to present a colorable claim on appeal with those situations in which it is in a defendant's ultimate best interest to end the proceedings sooner rather than later.

Thus, if a defendant can demonstrate either that: (1) the issue is debatable among jurists of reason; (2) a court could resolve the issue in a different manner; or (3) the question is adequate to proceed further, then the defendant's appeal is not frivolous as a matter of law and,

therefore, "counsel has a constitutionally imposed duty to consult with the defendant about an appeal" under *Ghant*. (Internal quotation marks omitted.) Id., 9. A defendant, therefore, may prevail on a claim of ineffective assistance of counsel under *Ghant* if he can satisfy any one of the *Lozada* criteria. Once he has done so, he "must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, *he would have timely appealed.*" (Emphasis added; internal quotation marks omitted.) Id., 10.

We now turn, therefore, to the question of whether the defendant's claim that his statements should have been suppressed because the police had failed to give him *Miranda* warnings was frivolous. The applicable law is well settled. "Two threshold conditions must be satisfied in order to invoke the warnings constitutionally required by *Miranda*: (1) the defendant must have been in custody; and (2) the defendant must have been subjected to police interrogation. . . . [A]lthough the circumstances of each case must certainly influence a determination of whether a suspect is in custody for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." (Citations omitted; internal quotation marks omitted.) *State* v. *Atkinson*, 235 Conn. 748, 757, 670 A.2d 276 (1996); see also *New York* v. *Quarles*, 467 U.S. 649, 665, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984); *Oregon* v. *Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 711 (1977); *State* v. *Pinder*, 250 Conn. 385, 409, 736 A.2d 857 (1999). "A person is in custody only if, in view of all the surrounding circumstances, a reasonable person would have believed [that] he was not free to leave." (Internal quotation marks omitted.)

State v. *Pinder,* supra, 409, citing *United States* v. *Mendenhall,* 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). "Further, the United States Supreme Court has adopted an objective, reasonable person test for determining whether a defendant is in custody. . . . Thus, in determining whether *Miranda* rights are required, *the only relevant inquiry is whether a reasonable person in the defendant's position would believe that he or she was in police custody of the degree associated with a formal arrest.*" (Citations omitted; emphasis added.) *State* v. *DesLaurier,* 230 Conn. 572, 577, 646 A.2d 108 (1994); *State* v. *Atkinson,* supra, 758; see also *Stansbury* v. *California,* 511 U.S. 318, 321, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994).

The defendant bears the burden of proving that he was in custody for *Miranda* purposes. *State* v. *Pinder,* supra, 250 Conn. 409. Two discrete inquiries are essential to determine custody: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." (Internal quotation marks omitted.) Id., 410. The first inquiry is factual, and we will not overturn the trial court's determination of the historical circumstances surrounding the defendant's interrogation unless it is clearly erroneous. Id., 410-11. "The second inquiry, however, calls for application of the controlling legal standard to the historical facts." (Internal quotation marks omitted.) Id., 410. The ultimate determination of whether a defendant was subjected to a custodial interrogation, therefore, "presents a mixed question of law and fact," over which our review is de novo. (Internal quotation marks omitted.) Id.; see also *State* v. *Johnson,* 241 Conn. 702, 719, 699 A.2d

57 (1997) ("historical facts surrounding custody reviewed for clear error; ultimate determination of custody reviewed de novo").

With those well settled principles in mind, we have reviewed the transcript of the defendant's recorded police interview, as well as the transcripts of the suppression hearing and the trial court's ruling thereon. We conclude that, contrary to the defendant's assertion, the defendant's interview with the police cannot, as a matter of law, be construed as a custodial interrogation for *Miranda* purposes.

The following additional facts, as revealed through the case file and transcripts, are necessary to resolve this appeal. At the defendant's suppression hearing, the defendant testified in support of his motion, and McDaniel testified on behalf of the state. The defendant testified that, on the day after his father had received a telephone call from McDaniel, he voluntarily went to the police station accompanied by his father and aunt. He further testified that, upon his arrival at the police station, McDaniel said that he needed to ask him a few questions concerning the "whole incident," and thereafter, McDaniel accompanied the defendant to a room with a recording device. The defendant testified further that he had been told several times that he was free to leave and that he was not under arrest. The defendant testified, moreover, that McDaniel had not threatened him in any way. McDaniel testified that, while the defendant had been at the police station, he never had been in custody, and he never was placed under arrest. McDaniel further testified that after he had finished asking the defendant questions, the defendant left the police station with his father. An examination of the transcript of the defendant's recorded

interview corroborates the testimony of both the defendant and McDaniel. See footnote 6 of this opinion.

We note that neither party disputes the underlying facts surrounding the defendant's interview. The parties' sole disagreement regarding the defendant's interrogation is whether he was "in custody" when he made his statements to police.

The defendant's contention that he was entitled to *Miranda* warnings in the present case is foreclosed by such cases as *Oregon* v. *Mathiason,* supra, 429 U.S. 494-96, *State* v. *Pinder,* supra, 250 Conn. 412-13, and *State* v. *Atkinson,* supra, 235 Conn. 759-61. In those cases, each of the defendants' claims that they were in custody failed because each voluntarily had gone to the police station and each had been free to leave at any time. In other words, because there had not been "a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest," the defendants in those cases, like the defendant in the present case, were not entitled to *Miranda* warnings. (Internal quotation marks omitted.) *State* v. *Atkinson,* supra, 757.

In *Mathiason,* for example, the defendant was the only suspect in a burglary investigation and he agreed to meet the investigating officer at the state patrol office to answer some questions. *Oregon* v. *Mathiason,* supra, 429 U.S. 493. The defendant was told that he was not under arrest and he was led to a closed office. Id. After being advised that he was believed to have been involved in the burglary, the defendant admitted that he had taken the property. Id. The officer then gave the defendant *Miranda* warnings and took a taped confession. Id., 493-94. At the end of the taped conversation, the defendant was told he

was not yet under arrest, and he then left the police station. Id., 494. Noting that the defendant voluntarily had gone to the police station, that he had been told that he was not under arrest, and that he left the station after the interview, the United States Supreme Court held that *Miranda* warnings had not been required because the defendant had not been in custody "or otherwise deprived of his freedom of action in any significant way." (Internal quotation marks omitted.) Id.

In *Pinder,* the defendant had agreed to take a polygraph test after police had become suspicious about inconsistencies in his previous interview. *State* v. *Pinder,* supra, 250 Conn. 392. The defendant had been told that he was not required to take the polygraph test and that he could leave at any time. Id., 394. We held that the defendant had not been in custody at any time during his questioning because he took the test of his own volition and he repeatedly was told that he was free to leave at any time. Id., 412-13.

Finally, in *Atkinson,* detectives investigating a murder questioned the defendant at the police station in a closed room about an unrelated robbery. *State* v. *Atkinson,* supra, 235 Conn. 753-54. When the questioning turned to the murder, however, the defendant was given *Miranda* warnings and later he implicated himself in the murder. Id., 754. The defendant moved to suppress his entire statement – the portions given both before and after he had been given *Miranda* warnings – claiming that he had been in custody throughout the interrogation. Id., 755-56. We held that the defendant was *never* in custody. Id., 760-61. Noting that the defendant voluntarily had gone to the police station, that he had not been handcuffed or arrested, and that he had been free to leave at any time, we

stated that "the concerns of *Miranda* are not implicated in this case." Id., 760. Accordingly, we held "that a reasonable person in the defendant's situation would not have believed that his movement was restricted to a degree that is associated with a formal arrest. . . . " Id., 760-61.

This court has stated several times, moreover, that it is realistic to assume "that a reasonable person would feel free to leave when that person was told repeatedly that he could do so." *State* v. *Pinder,* supra, 250 Conn. 413; see, e.g., *State* v. *Greenfield,* 228 Conn. 62, 71 n.10, 634 A.2d 879 (1993) ("an important factor distinguishing a consensual encounter from a seizure is whether the police expressly informed the defendant that he was free to leave at the outset of the interview"); *State* v. *Northrop,* 213 Conn. 405, 415, 568 A.2d 439 (1990) ("[i]t is difficult to conceive of a 'reasonable man' who would not feel free to leave after having been told so many times and in so many different ways that he could"); see also *State* v. *Lapointe,* 237 Conn. 694, 726, 678 A.2d 942 ("[g]iven the defendant's freedom of movement about the police station and the fact that he had been repeatedly told that he was free to leave, we conclude that the defendant was not in custody"), cert. denied, 519 U.S. 994, 117 S. Ct. 484, 136 L. Ed. 2d 378 (1996).

In the present case, the defendant voluntarily went to the police station. He was told several times that he was not under arrest. He was told several times that he was free to leave at any time, and, in fact, he did leave as soon as McDaniel had finished questioning him. The defendant was not threatened in any way. Given that the present case is legally indistinguishable from those previously discussed, coupled with the clear state of the law in this area, we conclude that, as a matter of law, the defendant

has failed to establish that he had nonfrivolous grounds for an appeal. The issue presented by the defendant is not debatable among jurists of reason, it could not reasonably have been resolved differently, and it does not raise questions deserving further appellate scrutiny. Accordingly, the defendant's claim on appeal is frivolous because it does not satisfy any of the *Lozada* criteria. Because we have concluded that the defendant's claim on appeal is frivolous, counsel was not required to consult with the defendant regarding a conditional plea of nolo contendere under § 54-94a. Thus, the defendant's claim of ineffective assistance of counsel fails under *Ghant*.

The defendant argues, nonetheless, that, as the Appellate Court noted; *State* v. *Turner,* supra, 67 Conn. App. 714; when taking into account his youth and unfamiliarity with the legal system, a court could have inferred that the defendant was "in custody" because he had felt that he was not free to leave. We disagree.

As previously discussed, when determining whether a *reasonable person* would have felt that he or she was free to leave, courts are to apply an *objective,* rather than a subjective, standard. See *State* v. *DesLaurier,* supra, 230 Conn. 577. "[T]he initial determination of custody depends on the objective circumstances of the interrogation, *not on the subjective views harbored by either the interrogating officers or the person being questioned.*" (Emphasis added.) *Stansbury* v. *California,* supra, 511 U.S. 323. Thus, in the present case, it is irrelevant that the defendant may have been a novice to police questioning. His subjective beliefs about whether he was in fact free to leave have no bearing on whether he was in custody for *Miranda* purposes. It is also irrelevant that the defendant was questioned under McDaniel's assumption, based on the victim's sworn

statement, that he had committed the crime. "*[T]he only relevant inquiry* is whether a reasonable person in the defendant's position would believe that he or she was in police custody of the degree associated with a formal arrest." (Emphasis added.) *State* v. *DesLaurier,* supra, 577.

The defendant argues that an appellate court could determine that he was in custody based on the "confinement and the restrictive setting in which [the defendant] was interrogated." We disagree.

The mere fact that the defendant's interview took place behind closed doors at the police station does not entitle the defendant to *Miranda* warnings. Indeed, the interrogations in both *Mathiason* and *Atkinson,* both of which fell short of "custodial interrogations," took place in almost factually identical conditions to those in the present case. As the United States Supreme Court noted in *Mathiason,* "a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that . . . the questioning took place in a 'coercive environment.' Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system [that] may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited."

(Emphasis in original.) *Oregon* v. *Mathiason,* supra, 429 U.S. 495.

It is important to note that our use of the *Lozada* criteria in this context does not imply that an appeal that is merely likely to be unsuccessful on the merits is necessary [sic] frivolous. On the contrary, we simply hold that, when the law is clear and well settled in a particular area, as it is in the present case, and the case would require only the application of that well settled law to undisputed or virtually undisputable facts, an appeal would be frivolous within the meaning of *Ghant.*

Finally, we are aware that it may seem paradoxical that we have concluded that the issue presented by the defendant was neither debatable among jurists of reason, nor reasonably could have been resolved differently; yet the Appellate Court came to a different conclusion. This is explainable, however, because the Appellate Court apparently applied a less stringent standard of frivolousness than that required by the *Lozada* criteria, which we had yet to apply in this context. The Appellate Court, moreover, improperly applied a subjective, rather than an objective, test for determining whether the defendant was in custody.[17] We are confident that, had the Appellate

[17] Much the same may be said of the dissent in the present case. The dissent focuses on a combination of factors to conclude that jurists of reason could disagree about whether the defendant was in custody. Specifically, these factors are: his age; his unfamiliarity with our criminal justice system; his presence in this country for two years; the fact that he was being asked questions about a crime; and the fact that his having voluntarily gone to the police station was prompted by his choice to avoid embarrassment in front of his peers and teachers at school. Suffice it to say that this constellation of factors turns what both

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the United States Supreme Court and this court repeatedly have stated is an objective test into a subjective test. Under the dissent's approach, the question is not whether a reasonable person in the defendant's position would believe that he was in police custody to the degree associated with a formal arrest; *State* v. *DesLaurier,* supra, 230 Conn. 577; but whether *this defendant* was likely to have believed that he was in custody to such a degree.

Furthermore, each of the cases on which the dissent relies for the proposition that the age of the defendant ought to be taken into account for determining custody, involved a defendant who was a juvenile under the laws of the applicable jurisdiction. See *Alvarado* v. *Hickman,* 316 F.3d 841, 843 (9th Cir.2002), cert. granted sub nom. *Yarborough* v. *Alvarado,* ___ U.S. ___, 124 S. Ct. 45, 156 L. Ed. 2d 703 (2003) (seventeen year old defendant was juvenile under California law); *State* v. *Savory,* 105 Ill. App. 3d 1023, 1029, 435 N.E.2d 226 (1982) (fourteen year old defendant was juvenile under Illinois law); *State* v. *Smith,* 546 N.W.2d 916, 926 (Iowa 1996) (fifteen year old defendants were juveniles under Iowa law); *In re L.M.,* 993 S.W.2d 276, 278 (Tex. App. 1999) (eleven year old defendant was juvenile under Texas law). By contrast, the defendant in the present case was for legal purposes an adult, over the age of eighteen; see General Statutes § 1-1d (defining age eighteen as age of majority); and, therefore, more than two years beyond juvenile status. Compare General Statutes § 46b-120 (1) (defining "'child'" as under age sixteen for purposes of delinquency prosecution). Indeed, had the defendant been a juvenile in the present case, his confession would have been inadmissible unless: (1) a parent was present during the interview; and (2) he and his parent had been advised of his right to counsel and his right to remain silent. General Statutes § 46b-137 (a).

The only cases relied on by the dissent that did not involve juvenile defendants are *People* v. *Horn,* 790 P.2d 816, 818 (Colo. 1990) (describing test for custody as "whether a reasonable person in the suspect's position would believe that he is deprived of his freedom of action in any significant way"), and *State* v. *Zancauske,* 804 S.W.2d 851, 859 (Mo. App.) (defendant was in custody because police already had enough evidence to make arrest, thereby making defendant focus of their suspicion), cert. denied, 502 U.S. 817, 112 S. Ct. 73, 116 L. Ed. 2d 47 (1991). Both cases, however, are simply out of step with the overwhelmingly prevailing jurisprudence that the United States Supreme Court, and this court, have adopted regarding the proper test for custody. We note, moreover, that *Horn* and *Zancauske* were decided three and four

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Court properly applied the *Lozada* criteria and applicable *Miranda* principles to the present case, it likewise would have concluded that an appeal in the present case would have been frivolous.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the trial court's judgment of conviction.

In this opinion KATZ, PALMER and VERTEFEUILLE, Js., concurred.

SULLIVAN, C.J., dissenting. The majority in the case presently before us concludes that, because reasonable jurists could not conclude that the defendant was in custody at the time of his interrogation, the failure of his attorney to apprise him of the opportunity to appeal if he entered a conditional plea of nolo contendere does not give rise to a claim of ineffective assistance of counsel. I first conclude that the majority adopts an inappropriate

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years, respectively, before the Supreme Court decided *Stansbury* v. *California*, supra, 511 U.S. 318, in which it reiterated that the requisite degree of restraint must be "'of the degree associated with a formal arrest' "; id., 322; and that "whether interrogating officers have focused their suspicions upon the individual being questioned . . . is not relevant for purposes of *Miranda*." Id., 326.

In addition, all of the cases relied on by the dissent are factually dissimilar. Without belaboring the point, a careful examination of all of those cases discloses significant factual differences from the facts found in the present case.

In sum, application of the "jurists of reason" test must be applied with some level of discrimination. Simply because there may be a few cases from other jurisdictions, however legally or factually dissimilar, that have reached different results, does not mean that we must ignore our own, and the United States Supreme Court's, repeated statements of the applicable law to the contrary.

standard for the evaluation of frivolous appeals. In addition, I believe that, even utilizing the standard that the majority adopts, reasonable jurists could disagree about the outcome of the forgone appeal. Accordingly, I respectfully dissent.

In the present case, the defendant, Garrick Turner, was an eighteen year old high school student who had been living in the United States for only two years and had never been arrested before his arrest in connection with this case. While investigating a complaint of sexual assault, a police detective called the father of the defendant and asked to speak with the defendant. The defendant testified that the police detective told him that he should come to the police station in order to avoid the embarrassment of the police coming to his school. The next day, the defendant, along with his father and his aunt, went to the police station. At the station, the defendant was taken to an interrogation room. There, he was interrogated by a single police officer. Although the defendant was told that he was free to leave, he was also asked questions implicating him in a crime and was told that the police were gathering evidence with respect to the crime. It is undisputed that the defendant was never told that he had a right to remain silent and a right to counsel and that his statements could be used against him.

The majority first sets forth a review of the law governing pleas of nolo contendere conditional on the right to appeal that applied at the time the defendant attempted to withdraw his appeal. The majority correctly notes that, at the time of the trial court proceedings in the present case, in order for the trial court to accept the defendant's plea of nolo contendere conditional on the right to appeal, that court would have had to find that its ruling on the

defendant's motion to suppress would have had a significant impact on the disposition of the case at trial. See footnote 4 of the majority opinion. The rules of practice also required the trial court to find, before accepting the plea, that the record was adequate for appellate review. Practice Book § 61-6(a)(2)(i). Although the majority acknowledges that the trial court's ruling denying the defendant's motion to suppress need not be fully dispositive of the case, but only have a significant impact on the outcome, the majority also concludes that in order to find that the trial court would have accepted a plea of nolo contendere conditional on the right to appeal, it would have required the defendant "to establish that: (1) the victim would not have testified against him; and (2) the denial of his motion to suppress would have had a significant impact on the case."[1]

Subsequently, assuming without deciding that the defendant made the requisite showings to the trial court so that it would have accepted the plea, the majority properly sets forth our review of claims of ineffective

[1] It is unclear to me why the majority would conclude that the defendant would need to establish that the victim would not have testified against him. As the majority acknowledges, the trial court's denial of the motion to suppress need not be dispositive of the case, but only have a significant impact on the outcome. Thus, in my opinion, even if the victim testified, in the absence of a confession from the defendant, and any medical or scientific evidence, the trial would become a much weaker case from the standpoint of the state. Accordingly, even if the victim testified in this case, the denial of the defendant's motion to suppress would still have had a substantial impact on the case.

assistance of counsel.[2] Specifically, the majority notes this court's decision in *Ghant* v. *Commissioner of Correction*,

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[2] The majority concludes that my analysis is incomplete because the record leaves doubt as to whether the trial court even would have accepted a nolo contendere plea. Although the trial court indicated that such a plea was inappropriate in this case; see footnote 10 of the majority opinion; in fact the trial court apparently utilized an improper standard. As the majority opinion states: "The [trial] court concluded, moreover, that a conditional plea of nolo contendere was inappropriate in this case because the trial was scheduled to begin shortly and the victim was expected to testify, meaning that the defendant's appeal would not have been '*dispositive*' of the case. . . ." (Emphasis added.) Footnote 10 of the majority opinion. As noted previously in this dissent, pursuant to the rules in effect at the time of the trial court's statement, the denial of the defendant's motion to suppress must have had only a substantial impact on the outcome of the proceedings at the trial court.

More fundamentally, the very reason that we do not know whether the trial court would have accepted a conditional plea of nolo contendere if it had been proffered prior to the defendant's pleading guilty is that the court was never asked to do so. Put differently, the failure of the defendant's prior counsel to notify the defendant of the possibility of the plea and to inquire of the trial court whether a conditional nolo contendere plea would be accepted is exactly what is being claimed as ineffective assistance of counsel. I cannot conceive how any fact finder could determine at this point whether the trial court would have accepted the plea if it had been offered at the appropriate time and the trial court had been apprised of the appropriate standard for accepting it. Thus, although the record does not establish conclusively that the trial court would have accepted a nolo contendere plea, it does not prevent me from considering whether the failure of the defendant's prior counsel at least to notify the defendant of the possibility of pleading nolo contendere constituted ineffective assistance of counsel.

Moreover, the majority misapplies the prejudice requirement as set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As the Appellate Court has recognized, "[f]or ineffectiveness claims resulting from guilty pleas, we apply the standard set forth in *Hill* v. *Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), which modified *Strickland's* prejudice prong." (Internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, 80 Conn.App. 96, 99, 832 A.2d 1210 (2003). In *Hill*, the United

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255 Conn. 1, 9, 761 A.2d 740 (2000), in which we concluded that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." (Internal quotation marks omitted.) From this, the majority concludes that, in order to prevail on appeal on his claim of ineffective assistance

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States Supreme Court stated that, in such cases, the focus is "on whether counsel's constitutionally ineffective performance affected the outcome of the *plea process*. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Emphasis added.) *Hill* v. *Lockhart*, supra, 59. Therefore, the defendant's required showing of actual harm is satisfied by evidence of a reasonable probability that, but for the ineffective assistance of counsel, the defendant would not have pleaded guilty.

Thus, in my view, the defendant should not be required to show that, "but for counsel's deficient performance, he would have entered a plea under [General Statutes] § 54-94a, which, in turn, requires him to show that the court would have accepted such a plea." See footnote 15 of the majority opinion. It is clear to me that there was at least a reasonable probability that the defendant in the present case would not have pleaded guilty but for his prior counsel's failure to notify him of the possibility of pleading nolo contendere. I also believe that there is at least a reasonable probability that, if the court had refused to accept the defendant's nolo contendere plea, the defendant would have insisted on going to trial in order to preserve his right to appeal. Specifically, the defendant subsequently attempted to withdraw that guilty plea after he acquired new counsel. Accordingly, I would conclude that the defendant has satisfied the second prong of *Strickland*, as modified by *Hill*. Consequently, contrary to the majority's assertion, a fundamental predicate indeed exists for the review of the defendant's ineffective assistance of counsel claim.

of counsel, the defendant must establish that there were nonfrivolous grounds for an appeal from the trial court's denial of his motion to suppress.

As a result of this conclusion, the majority sets forth two tests that this court has utilized to define the frivolousness of an appeal. The first, taken from the commentary to rule 3.1 of the Rules of Professional Conduct, states that an action is frivolous "if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." See *Texaco, Inc.* v. *Golart,* 206 Conn. 454, 464 n.7, 538 A.2d 1017 (1988). The second definition of frivolousness, and the one the majority ultimately adopts, requires the person moving for an appeal to demonstrate that "the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Internal quotation marks omitted.) This language is taken from the United States Supreme Court's per curiam decision in *Lozada* v. *Deeds,* 498 U.S. 430, 432, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), which concluded that the United States Court of Appeals for the Ninth Circuit improperly denied the issuance of a certificate of probable cause required for an appeal from the denial of federal habeas corpus relief.

As the majority explains, this court has utilized the *Lozada* test in prior cases involving the frivolousness of appeals. For example, in *State* v. *James,* 261 Conn. 395, 409, 802 A.2d 820 (2002), this court adopted the *Lozada* test in order to provide a framework within which to

determine whether a trial court abused its discretion when it denied the state's request to appeal pursuant to General Statutes § 54-96. In *James,* we noted that "[t]he *Lozada* inquiry already provides us with well marked guideposts for the exercise of trial court discretion in two other *areas of appeals requiring permission or certification to appeal.*" (Emphasis added.) Id., 404. In those prior cases, the *Lozada* test again provided a framework within which to review a claim that was subject to an abuse of discretion standard. For instance, in *Simms* v. *Warden,* 230 Conn. 608, 616, 646 A.2d 126 (1994), we concluded that the *Lozada* test applied to the denial of a request for certification to appeal from an adverse habeas corpus determination pursuant to General Statutes § 52-470(b). In addition, we have concluded that the *Lozada* test applied to the review of the denial of petitions for certification to appeal the denial of a request for a new trial. *Seebeck* v. *State,* 246 Conn. 514, 534, 717 A.2d 1161 (1998).

In all of those cases, however, the right to appeal was subject to the permission of the trial court. Thus, our review centered around whether the trial court abused its discretion when it denied the party the right to appeal. In the present case, however, once the trial court has accepted a plea of nolo contendere, the trial court's permission was not required in order to appeal. Instead, the defendant who pleads nolo contendere conditional on the right to appeal may appeal to challenge the denial of a motion to suppress *as a matter of statutory right.* See General Statutes (Rev. to 1999) § 54-94a ("[w]hen a defendant . . . enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress . . . the *defendant after the imposition of sentence may file an appeal within the time*

prescribed by law" [emphasis added]). Put differently, although the decision whether to *accept the plea* is subject to the trial court's discretion, the actual appeal that results from that decision is a matter of statutory right. Accordingly, it is simply not appropriate to utilize the *Lozada* test when evaluating the frivolousness of an appeal that the defendant would be entitled to file as a result of the acceptance of a plea of nolo contendere conditioned on a right to appeal.

Instead, I would adopt the standard this court adopted in *Texaco, Inc.* v. *Golart,* supra, 206 Conn. 464. Thus, the appeal in the present case would have been frivolous if "the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer [was] unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." (Internal quotation marks omitted.) Id., 463-64 n.7.[3] Indeed, this court reaffirmed the use of this standard recently in *Schoonmaker* v. *Lawrence Brunoli, Inc.,* 265 Conn. 210, 254-55, 828 A.2d 64 (2003), in which we concluded that the standard explicated in *Texaco, Inc.,* was the standard by which this court reviews a claim that

[3] Good faith is defined by Black's Law Dictionary as: "[h]onesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious. . . ." Black's Law Dictionary (6th Ed.1990).

a prevailing party was entitled to attorney's fees as a result of another party's bringing a frivolous action.

My conclusion that the less stringent standard of frivolousness should apply also finds support within the context of the defendant's claim. The definition employed by the Rules of Professional Conduct exists in order to evaluate attorney conduct and to provide a basis for sanctions for bringing a frivolous appeal. Consequently, it is entirely reasonable that the question of whether attorneys have engaged in ineffective assistance of counsel because they failed to notify their clients of nonfrivolous grounds for appeal should be answered by resort to the rules detailing the attorneys' conduct. Put another way, because in this case we are looking to the attorney's conduct, namely, whether the attorney engaged in ineffective assistance of counsel, the standards governing our review should be the rules prescribing that conduct. Additionally, the rules prescribing the attorney's conduct define what constitutes a frivolous appeal, specifically, as it applies to this case, one that is not grounded in a good faith argument. The standard of frivolousness, then, should originate within the context of the attorney's conduct and what they could be sanctioned for, rather than within the context of a review of the trial court's discretion in allowing an appeal to go forward.

Because I would have concluded that good faith grounds for an appeal existed in the present case, I believe that counsel for the defendant engaged in ineffective assistance of counsel by failing to inform the defendant of his right to appeal if he had pleaded nolo contendere subject to a right to appeal. Specifically, the defendant's challenge to the trial court's finding of no custody with respect to his *Miranda* claim constituted a good faith basis

for an appeal, and, therefore, the defendant's prior counsel should have informed him of that ground for appeal before the defendant pleaded guilty to the crimes with which he was charged.

Even under the standard that the majority adopts, however – namely, whether the issues are debatable among jurists of reason, or a court could resolve the issues in a different manner, or the questions deserve encouragement to proceed further – I would conclude that the determination of whether the defendant was in custody for *Miranda* purposes would not have constituted a frivolous appeal. The majority properly sets forth the standard that we utilize when determining whether a person is in custody for *Miranda* purposes. Specially, as the majority states: "'A person is in custody only if, in view of all the surrounding circumstances, a reasonable person would have believed [that] he was not free to leave.' (Internal quotation marks omitted.) *State* v. *Pinder,* [250 Conn. 385, 409, 736 A.2d 857 (1999)]. . . . " (Citation omitted.) The majority also properly explains that "'the only relevant inquiry is whether a reasonable person in the defendant's position would believe that he or she was in police custody of the degree associated with a formal arrest.'" I, however, disagree that the reasonable and objective test cannot take into account the defendant's status as an eighteen year old high school student who had recently immigrated to this country and had no prior experience with our legal system.[4]

[4] I find curious the majority's characterization of this dissent as applying a subjective rather than objective test. See footnote 17 of the majority opinion. Specifically, I do not question the majority's conclusion that courts are to apply an objective test rather than a subjective

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Numerous cases conclude that the age of the defendant should be taken into account when determining whether a juvenile would reasonably believe he was not free to leave a police interrogation. Specifically, the United States Court of Appeals for the Ninth Circuit recently concluded that the determination of "custody" for *Miranda* purposes can take into account the defendant's status as a juvenile. In *Alvarado* v. *Hickman,* 316 F.3d 841, 844 (9th Cir. 2002), cert. granted sub nom. *Yarborough* v. *Alvarado,* ___ U.S. ___, 124 S. Ct. 45, 156 L. Ed. 2d 703 (2003), the habeas petitioner, who was seventeen years old at the time of the crime, had been convicted of second degree murder and attempt to commit robbery. The conviction was based primarily on a statement the petitioner gave to the police while being interviewed with respect to the crime. Id.

In *Alvarado,* while investigating a murder, the police contacted the petitioner's mother at work and informed her that they needed to speak with her son. Id. The petitioner's mother told the police that she and the petitioner's father would bring the petitioner to the police station. Id. While at the police station, the petitioner's parents were denied permission to be present during the interview. Id. The court also pointed out that the petitioner had never

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standard when determining whether a suspect was in custody for *Miranda* purposes. My belief, however, is that anyone in the defendant's position similarly would feel as though he was not free to leave, *because of* such factors as his age and his inexperience with the legal system. Thus, I am not declaring that, because the *defendant* felt he could not leave he was in custody for *Miranda* purposes, which would indeed be applying a subjective test. Rather, in my opinion, a reasonable person, *when in the defendant's position,* would not have felt that he was free to leave the police station.

been questioned by the police before and had no prior criminal history. Id. The interview with the petitioner lasted approximately two hours, during which the petitioner was never given and did not waive his *Miranda* rights. Id. The petitioner first denied involvement in the murder. The detective then informed him that she did not believe his statements and that she had witnesses who said "'quite the opposite.'" Id. The petitioner thereafter began to divulge details of the murder and his role in hiding the murder weapon. Id. During the interview, the detective hinted to the petitioner that he would be going home after the interview. Id. The petitioner's statement to the police was introduced as evidence at his trial. Id.

The District Court denied the habeas petition, and on appeal, the state relied on *Oregon* v. *Mathiason,* 429 U.S. 492, 493-95, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977), to claim that, because the petitioner was not under arrest, voluntarily went to the police station and was allowed to leave after the interview, he was not in custody and, therefore, his *Miranda* rights did not attach. *Alvarado* v. *Hickman,* supra, 316 F.3d 846-47. The Circuit Court distinguished *Mathiason* on several grounds. First, the court noted, the defendant in *Mathiason* went to the police station voluntarily and was told immediately that he was not under arrest. Id., 847. In *Alvarado,* the court determined, arrangements for the police interview were made by the petitioner's parents, and the petitioner was never told that he was not under arrest. Id. Second, while the interview in *Mathiason* lasted only thirty minutes, the interview in *Alvarado* lasted two hours, and the petitioner repeatedly had denied his involvement. Id. Third, the suspect in *Mathiason,* as a parolee, had experience in the criminal justice system. As the Ninth

Circuit pointed out, in *Alvarado,* "[the petitioner] had no prior experience with the police." Id.

The Ninth Circuit acknowledged that both the petitioner and the state had constructed their arguments regarding the custody status of the petitioner under an objective standard. Id., 848. The court explained, however, that the petitioner's "status as a minor is an important subsidiary issue that potentially alters the constitutional analysis." Id. The court noted that under the United States Supreme Court's due process jurisprudence, a criminal defendant's age "has long been a relevant factor in determining whether a confession or a waiver of a constitutional right was voluntary." Id.

The court in *Alvarado* additionally relied on *In re Gault,* 387 U.S. 1, 42-43, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), to conclude that the petitioner's juvenile status could be taken into account when determining custody. *Alvarado* v. *Hickman,* supra, 316 F.3d 849. In *In re Gault,* supra, 55, the United States Supreme Court stated: "If counsel was not present for some permissible reason when an admission was obtained, *the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or adolescent fantasy, fright or despair.*" (Emphasis added.) The court in *Alvarado* relied on that language to explain that "if a juvenile is more susceptible to police coercion during a custodial interrogation than would be a similarly situated adult, there is no reason why the same juvenile would not similarly be less capable of determining whether he was,

in fact, in custody in the first place." *Alvarado* v. *Hickman,* supra, 849-50. Considering other factors[5] as well as the age of the petitioner in the objective determination of custodial status, the court concluded that they did not believe a reasonable seventeen year old in the petitioner's position would have felt "at liberty to terminate the interrogation and leave." (Internal quotation marks omitted.) Id., 851; see also *People* v. *Savory,* 105 Ill. App. 3d 1025, 1028, 435 N.E.2d 226 (1982) (factors involved in determination regarding custodial status include: location, time, length, mood and mode of interrogation; number of police officers present; presence or absence of friends or family of accused; any indicia of formal arrest; manner in which person questioned got to place of interrogation; whether suspect voluntarily assists police in their investigation; whether subject is allowed to walk within and from location of interrogation unaccompanied by police; and "*the age, intelligence and mental makeup of the accused*" [emphasis added]); *State* v. *Smith,* 546 N.W.2d 916, 923 (Iowa 1996) (holding that "it is appropriate to consider the age of the defendants as an additional factor in making a determination as to custody status").[6]

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[5] The other factors considered by the court included "[1] the language used by the officer to summon the individual, [2] the extent to which he or she is confronted with evidence of guilt, [3] the physical surroundings of the interrogation, [4] the duration of the detention and [5] the degree of pressure applied to detain the individual." (Internal quotation marks omitted.) *Alvarado* v. *Hickman,* supra, 316 F.3d at 846.

[6] See also *In re L.M.,* 993 S.W.2d 276, 289 (Tex.App.1999) ([S]tandard for determining whether juvenile is in custody is "whether, based upon the objective circumstances, a reasonable child of the same age would believe her freedom of movement was significantly restricted. Our holding does not conflict with the standard applied in earlier Texas

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Additionally, although the majority relies in part on the fact that the defendant was told that he was free to leave the interrogation, that fact is not dispositive of the question of custodial status. See *People* v. *Horn,* 790 P.2d 816, 818-19 (Colo. 1990) (custody found where interrogation was "accusative from the outset" and stating that "[a]lthough the defendant was repeatedly told that he was free to leave and that he would not be arrested that day, he was also confronted with the evidence against him and informed that charges would be filed against him regardless of his interview responses").

Although I acknowledge that the defendant in this case was eighteen years old at the time of the interrogation, I see no difference in kind between a seventeen year old murder suspect and an eighteen year old high school student who has no experience with the criminal justice system and has lived in this country for only two years. In the present case, while the defendant was told that he was free to leave, he contemporaneously was being asked questions that implicated him in a crime and was told he was there for the police to "gather evidence" about a crime. Moreover, although this court previously has found that there is no custody when a defendant voluntarily goes to the police station,[7] here, the defendant was told he would be "better off" if he went to the station. Consequently,

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cases, but expressly provides for consideration of age under the reasonable-person standard established in *Stansbury* [v. *California,* 511 U.S. 318, 322-24, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994)].).

[7] But see *State* v. *Zancauske,* 804 S.W.2d 851 (Mo.App.) (although defendant voluntarily traveled to police station, he was in custody for *Miranda* purposes), cert. denied, 502 U.S. 817, 112 S.Ct. 73, 116 L.Ed.2d 47 (1991).

although technically the defendant voluntarily traveled to the station, it was a result of the threat of embarrassment in front of his peers and teachers at school. Under these circumstances, I believe that reasonable jurists could disagree over whether a reasonable person in the defendant's position would have believed that he was free to leave the interrogation.

Accordingly, I respectfully dissent.

APPENDIX B

State of Connecticut vs. Garrick Turner

67 Conn. App. 708, 789 A.2d 1058 (2002)

Connecticut Appellate Court

STATE OF CONNECTICUT *v.* GARRICK TURNER
(AC 21020)

Lavery, C. J., and Dranginis and Dupont, Js.

Carlton L. Hume and *John A. Henneberger* filed a brief for the appellant (defendant).

Jonathan C. Benedict, state's attorney, *Michele C. Lukban*, assistant state's attorney, and *Joseph Harry*, senior assistant state's attorney, filed a brief for the appellee (state).

Opinion

DRANGINIS, J. The defendant, Garrick Turner, appeals from the trial court's judgment of conviction, rendered following his guilty plea, of sexual assault in the second degree in violation of General Statutes § 53a-71(a)(1)[1] and risk of injury to a child in violation of General Statutes (Rev. to 1997) § 53-21(1).[2] On appeal, the defendant claims that he was denied due process of law by ineffective assistance of counsel because his trial attorney

[1] General Statutes § 53a-71(a) provides in relevant part: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person. . . ."

[2] General Statutes (Rev. to 1997) § 53-21 provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that life or limb of such child is endangered . . . or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of a class C felony."

did not inform him of his right to enter a conditional plea of nolo contendere so that he could appeal from the denial of his motion to suppress.[3] We agree with the defendant and reverse the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. On March 8, 1998, the defendant went to the Bridgeport police station. His father had received a telephone call the day before from Mark McDaniel, a sergeant, requesting to speak to the defendant. The defendant was eighteen years old, had no prior criminal history and had been living in the United States for only two years. The defendant resided with his father, who, along with the defendant's aunt, accompanied him to the police station.

At the station, McDaniel questioned the defendant alone. The interrogation lasted about thirty to forty minutes, three to four minutes of which were recorded. McDaniel asked the defendant if he had engaged in sexual intercourse with the victim and when that had occurred. The defendant responded that he had engaged in sexual intercourse with the victim two times in March, 1998, when the victim was fifteen years old. The defendant was subsequently charged with sexual assault in the second degree and risk of injury to a child.

Before entering his guilty plea, the defendant filed a motion to suppress his statement to the police, and an evidentiary hearing followed. The defendant's counsel

[3] The defendant did not appear at oral argument in this court and is deemed to have waived it. At the state's request, the case was considered on the papers.

called the defendant as his only witness. The defendant claimed that his statement to the police was inadmissible because he had been interrogated at the police station, under circumstances from which it could be inferred that he was in custody, without having been notified of his rights under *Miranda* v. *Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

At the hearing, McDaniel admitted that he did not read the defendant *Miranda* warnings because the defendant was neither under arrest nor in custody. He testified that he told the defendant several times during the interrogation that he was free to leave and that he was not under arrest. McDaniel further testified that he did not threaten the defendant or pressure him into making his statement. The court concluded that the defendant failed to sustain his burden of proving that he was in custody at the time of the interview and therefore denied the motion to suppress. Thereafter, the defendant pleaded guilty to the charges of sexual assault in the second degree and risk of injury to a child.

On June 14, 2000, prior to sentencing, the defendant filed a motion to vacate and to withdraw his guilty plea on the ground that his trial counsel was ineffective in failing to inform him that by pleading guilty, he was waiving his right to appeal from the court's denial of his motion to suppress. See Practice Book § 39-27(4). The defendant requested the withdrawal of his plea so that he could enter a new plea of nolo contendere in accordance with General

Statutes § 54-94a[4] and thereby preserve his right to appeal from the denial of his motion to suppress. The court denied the motion to withdraw on the ground that the defendant had not demonstrated ineffective assistance of counsel. The court sentenced the defendant to a total term of incarceration of ten years, execution suspended after nine months, and ten years conditional probation in accordance with the state's recommended sentence offered pursuant to its plea agreement with the defendant. The defendant's appeal followed.

On appeal, the defendant claims that the court improperly denied his motion to vacate in that his guilty plea was involuntarily and unknowingly entered because he had received ineffective assistance of counsel. He cites counsel's failure to inform him of his statutory right to plead nolo contendere and thereby preserve his right to appeal from the denial of his motion to suppress, in violation of his rights as guaranteed under the sixth and fourteenth amendments to the United States constitution. We agree and reverse the judgment of the trial court.

"We have long held that the proper forum in which to address claims of ineffective representation of counsel is in the habeas forum or in a petition for a new trial, rather

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[4] General Statutes § 54-94a provides in relevant part: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's . . . motion to suppress statements and evidence based on the involuntariness of a statement or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. . . ."

than on direct appeal." (Internal quotation marks omitted.) *State* v. *Laracuente,* 57 Conn. App. 91, 97, 749 A.2d 34, cert. denied, 253 Conn. 923, 754 A.2d 798 (2000), quoting *State* v. *Jones,* 46 Conn. App. 640, 660, 700 A.2d 710, cert. denied, 243 Conn. 941, 704 A.2d 797 (1997). "As our Supreme Court has stated, an ineffective assistance claim should be resolved, not in piecemeal fashion, but as a totality after an evidentiary hearing in the trial court. . . . " (Internal quotation marks omitted.) Id.

"Section 39-27 of the Practice Book . . . provides an exception [permitting a direct appeal] when ineffective assistance of counsel results in a guilty plea. A defendant must satisfy two requirements . . . to prevail on a claim that his guilty plea resulted from ineffective assistance of counsel. . . . First, he must prove that the assistance was not within the range of competence displayed by lawyers with ordinary training and skill in criminal law. . . . Second, there must exist such an interrelationship between the ineffective assistance of counsel and the guilty plea that it can be said that the plea was not voluntary and intelligent because of the ineffective assistance." (Internal quotation marks omitted.) *State* v. *Gray,* 63 Conn. App. 151, 161-62, 772 A.2d 747, cert. denied, 256 Conn. 934, 776 A.2d 1151 (2001).

In *Strickland* v. *Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court adopted a two part standard for evaluating claims of ineffective assistance of counsel pursuant to which a defendant must show (1) that counsel's representation fell below an objective standard of reasonableness and (2) that counsel's deficient performance prejudiced the defense. See *Copas* v. *Commissioner of Correction,* 234 Conn. 139, 154, 662 A.2d 718 (1995); see also *Hill* v.

Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *Daniel* v. *Commissioner of Correction,* 57 Conn. App. 651, 664-65, 751 A.2d 398, cert. denied, 254 Conn. 918, 759 A.2d 1024 (2000). To prevail, a defendant must satisfy both prongs of the *Strickland* test. *Quintana* v. *Commissioner of Correction,* 55 Conn. App. 426, 445, 739 A.2d 701, cert. denied, 252 Conn. 904, 743 A.2d 614 (1999). The court determined that the defendant had failed to meet his burden of satisfying either prong of the *Strickland* test.

After the trial court's ruling here, our Supreme Court decided *Ghant* v. *Commissioner of Correction,* 255 Conn. 1, 761 A.2d 740 (2000), and, while not directly on point, it is instructive.[5] In *Ghant,* our Supreme Court reversed a habeas court's decision that counsel's representation was ineffective because of counsel's failure to inform the petitioner that he had a right to appeal from the judgment of conviction for murder after entering his guilty plea pursuant to the *Alford*[6] doctrine. Id., 2-3. The *Ghant* court cited *Roe* v. *Flores-Ortega,* 528 U.S. 470, 480, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000), in which the United States

[5] There is a vast difference between the facts of *Ghant,* which involved a claim pursuant to a writ of habeas corpus that the plea canvass prior to trial was defective, and the facts of this case, which concerns a claim that the defendant should have been permitted to withdraw his plea of guilty to allow him to appeal from the denial of his motion to suppress his confession.

[6] *North Carolina* v. *Alford,* 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). "A defendant who pleads guilty under the *Alford* doctrine does not admit guilt, but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea." *Henry* v. *Commissioner of Correction,* 60 Conn. App. 313, 315 n.1, 759 A.2d 118 (2000).

Supreme Court rejected a per se rule and concluded that a constitutionally imposed duty to consult with a defendant regarding an appeal exists if either (1) "a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) . . . this particular defendant reasonably demonstrated to counsel that he was interested in appealing." (Internal quotation marks omitted.) *Ghant* v. *Commissioner of Correction,* supra, 9, 761 A.2d 740. The *Ghant* court determined that the petitioner failed to show that there were nonfrivolous grounds for appeal from his conviction and, therefore, that counsel had no reason to think that a rational defendant would have wanted to appeal. Id., 16-17.

The state argues on appeal that, pursuant to *Ghant,* the failure to inform the defendant of his right to appeal does not amount to ineffective assistance of counsel because the appeal would have been wholly frivolous. We do not agree. Here, the defendant was entitled to be notified of his statutory right to plead nolo contendere and to appeal from the denial of his motion to suppress under the facts of this case. This is so because it is possible that he might have prevailed on his claim that his *Miranda* rights were violated because he believed he was in custody due to his inexperience with the criminal system. Without the confession, a finding of guilty after a jury trial would have been problematic, and, therefore, under the analysis set forth in *Ghant,* the defendant had nonfrivolous grounds for an appeal. His options, under the facts of this case, were severely limited because he was not informed of his statutory right to plead nolo contendere and to appeal from the denial of the motion to suppress. His ability to articulate a desire to appeal was hampered by counsel's failure to inform. Under these circumstances, counsel's

failure to inform him was unreasonable. Furthermore, when the defendant consulted new counsel and was informed of the statutory right, he made a timely motion to withdraw the guilty plea, from which it can be inferred that he was expressing an affirmative desire to appeal once he had been properly informed.

A criminal defendant waives three constitutional rights when he pleads guilty: the privilege against compulsory self-incrimination; the right to a jury trial; and the right to confront his accusers. *Boykin* v. *Alabama,* 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Section 54-94a provides the means whereby a defendant can preserve his right to appeal. "Such a significant protection of liberty as a right to appeal made available to all persons convicted of crimes, must be viewed as fundamental, although its basis is statutory rather than constitutional." *D'Amico* v. *Manson,* 193 Conn. 144, 147, 476 A.2d 543 (1984).

Due process requires that a plea be entered voluntarily and intelligently. *Boykin* v. *Alabama,* supra, 395 U.S. at 243 n.5; *Oppel* v. *Lopes,* 200 Conn. 553, 556, 512 A.2d 888 (1986); *State* v. *Lopez,* 197 Conn. 337, 341, 497 A.2d 390 (1985). "Because every valid guilty plea must be demonstrably voluntary, knowing and intelligent, we require the record to disclose an act that represents a knowing choice among available alternative courses of action, an understanding of the law in relation to the facts, and sufficient awareness of the relevant circumstances and likely consequences of the plea." *State* v. *Watson,* 198 Conn. 598, 604, 504 A.2d 497 (1986). "A determination as to whether a plea has been knowingly and voluntarily entered entails an examination of all of the relevant circumstances." *State* v. *Wright,* 207 Conn. 276, 287, 542 A.2d 299 (1988).

In this case, due to the ineffective assistance of counsel, the defendant was not told of his statutory right to plead nolo contendere and was prejudiced by the entry of a guilty plea, which extinguished his right to appeal. The defendant did not understand that a guilty plea, unlike a nolo plea, would waive his right to appeal from the decision on the motion to suppress. The defendant's plea cannot be considered knowing or intelligent in that sense. We therefore conclude that the court abused its discretion in denying the defendant's motion to vacate his guilty plea.

The judgment is reversed and the case is remanded with direction to vacate the guilty plea, to accept the defendant's plea of nolo contendere pursuant to § 54-94a and to render judgment thereon.

In this opinion the other judges concurred.

Supreme Court, U.S.
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No. 03-1448

In The

Supreme Court Of The United States

GARRICK TURNER,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION WITH ATTACHED APPENDIX

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QUESTION PRESENTED

Has this Court's recent decision in *Yarborough v. Alvarado*, No. 02-1684, slip op. (June 1, 2004), already resolved the question of whether the objective test, used to determine custody for purposes of entitlement to *Miranda* warnings, should be altered by factors such as a defendant's having reached the age of majority and having had no prior experience with law enforcement?

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OPINIONS BELOW

The Supreme Court of the State of Connecticut issued its opinion on January 20, 2004. This opinion is reported at 267 Conn. 414, 838 A.2d 947 (2004), and is reproduced in the petitioner's Appendix A. The Appellate Court of the State of Connecticut issued its opinion on January 29, 2002. This opinion is reported at 67 Conn. App. 708, 789 A.2d 1058 (2002), and is reproduced in the petitioner's Appendix B. The Superior Court of the State of Connecticut issued its opinion denying the petitioner's Motion to Suppress on April 14, 2000. A copy of this opinion is located in the respondent's Appendix at A1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

Connecticut General Statutes (Rev. to 1999) § 53-21, Injury or risk of injury to, or impairing morals of, children, provides, in pertinent part

> Any person who. . .(2) has contact wit h the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child, . . . shall be guilty of a class C felony.

Connecticut General Statutes § 53a-71, sexual assault in the second degree, provides, in pertinent part

> (a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person; . . .

Connecticut General Statutes (Rev. to 1999) § 54-94a, conditional nolo contendere plea, Appeal of denial of motion to suppress or dismiss, provides

> When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress evidence based on an unreasonable search or seizure, motion to suppress statements and evi-

dence based on the involuntariness of a statement or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution.

STATEMENT OF THE CASE

At the time the petitioner was interviewed by the police, he was 18 years and 10½ months old. The question of whether the petitioner was in custody at the time of this interview was not the dispositive issue in this matter. Rather, the dispositive issue was whether the petitioner's attorney rendered ineffective assistance of counsel by failing to tell the petitioner that by entering guilty pleas, he was giving up his right to appeal the denial of his motion to suppress his statement. Consistent with *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029 (2000), the analytical framework to resolve the issue of counsel's effectiveness focused on if a rational defendant would have wanted to appeal because, for example, there were nonfrivolous grounds for appeal. Because the only issue presented by the petitioner's motion to suppress was whether he was in custody and therefore entitled to have been given his *Miranda* warnings, the consideration of whether the petitioner was in custody was not directly implicated but was a prerequisite to the final determination of whether counsel had a constitutionally imposed duty to consult with the petitioner regarding an appeal.

A. Procedural History

The state charged the petitioner with sexual assault in the second degree, in violation of Connecticut General Statutes § 53a-71(a)(1), and risk of injury to a child, in violation of Connecticut General Statutes (Rev. to 1999) § 53-21(2). The petitioner filed a Motion to Suppress his statement to the police admitting having had sexual intercourse with his girlfriend, who was under the age of 16 at the time. After an evidentiary hearing, the trial court denied the petitioner's Motion. Respondent's Appendix, A1.

On April 14, 2000, the petitioner entered guilty pleas to both counts, which were accepted by the trial court. Thereafter, the petitioner filed a Motion to Withdraw and Vacate his pleas claiming he was denied effective assistance of counsel. He claimed that counsel was ineffective by failing to inform him that, by entering guilty pleas, he would give up his right to appeal the denial of his Motion to Suppress. The petitioner further argued that counsel should have informed him of the existence of a conditional plea of nolo contendere; Connecticut General Statutes (Rev. to 1999) § 54-94a; under which he could reserve his right to appeal the denial of his Motion to Suppress. On June 19, 2000, the trial court denied the Motion to Withdraw and sentenced the petitioner to a total effective term of incarceration of 10 years, execution suspended after 9 months, and 10 years probation.

B. Facts Pertinent To The Motion To Suppress

On April 13, 2000, the trial court, *Turner, J.*, held an evidentiary hearing on the petitioner's Motion to Suppress. The petitioner claimed that his statement to the police was inadmissible because he had been interrogated at the police station, under circumstances from which it could be inferred that he was in custody, without having been notified of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). The petitioner testified in support of his Motion and the state presented the testimony of Sergeant Mark McDaniel in opposition.

The petitioner testified that he attended grammar school in Jamaica and had lived there for 16 years.[1] Thereafter, he attended high school in Bridgeport, Connecticut and, at the time of his testimony in support of his Motion to Suppress, was a freshman at Dowling College.

With regard to his statement to the police, the petitioner testified that on December 12, 1998, the day after his father received a telephone call from McDaniel, he, his father and aunt voluntarily went to the police station because his father had been told that the police wanted to speak with him. After McDaniel greeted the petitioner and his family, McDaniel told the petitioner that he wanted to speak with him. At the time of the interview, the petitioner was 18 years, 10½ months old and had never previously been to a police station.[2]

The petitioner further testified that McDaniel brought him into a room which had a recording machine and told him that he needed to speak with him to gather some evidence, but that the petitioner was free to leave. McDaniel then turned on the tape recorder and repeated that the petitioner was free to leave.

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[1] The Connecticut Supreme Court, in its recitation of the facts, reports that the petitioner had been in this country for 2 years prior to being questioned by the police. This factual assertion is apparently based on the petitioner's testimony that he lived in Jamaica for 16 years. The defendant, however, did not testify that he had emigrated to the United States at the age of 16. Rather, the petitioner testified that he came to the United States in 1994. On the other hand, the date on which this testimony was elicited was April 13, 2000, and the petitioner also testified that he had come to this country 4 years earlier, which would have been 1996.

[2] Although footnote 6 of the opinion of the Connecticut Supreme Court lists the petitioner's birth date as January 2, 1980, the Original Information records his birth date as January 21, 1980. Regardless of this discrepancy, the petitioner was almost 19 years of age at the time he was interviewed by the police.

See, *State v. Turner*, 267 Conn. 414, 419 n. 6, 838 A.2d 947 (2004) (Transcribed statement). McDaniel asked the petitioner for his date of birth, if he had engaged in sexual intercourse with the victim, and when that had occurred. The petitioner responded that he had engaged in sexual intercourse with the victim on two occasions in March 1998 when the victim was 15 years old. The petitioner reviewed a transcription of the interview and stated that it was an accurate account of what had transpired.

The petitioner testified that, throughout the interview, he and McDaniel were the only people in the room. He further acknowledged that McDaniel told him several times that he was free to leave and that he was not under arrest. He also testified that McDaniel did not threaten him or pressure him into making his statement. The petitioner estimated that the interview lasted between 30 and 45 minutes.

The state presented the testimony of Sergeant Mark McDaniel. McDaniel's testimony was consistent with the petitioner's except that according to McDaniel, the interview lasted approximately 3 to 4 minutes. In addition, McDaniel testified that at no time was the petitioner under arrest or in custody and, at the end of the interview, the petitioner left the police station with his father.[3] McDaniel further testified that he did not threaten or harass the petitioner, and that they were the only two people in the room throughout the interview. McDaniel also testified that the petitioner never stated he wanted to stop the interview or that he wanted to speak with an attorney. There is no dispute that the petitioner was never given *Miranda* warnings and McDaniel testified he did not give the petitioner *Miranda* warnings because the petitioner was not in custody.

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[3] The petitioner was not arrested until December 30, 1998, eighteen days after giving his statement to the police.

In an oral memorandum of decision, the trial court, *Turner, J.*, denied the petitioner's Motion to Suppress. Respondent's Appendix at A1. In rendering its decision, the trial court found that, as a result of McDaniel's telephone call to the petitioner's home, the petitioner, his father and his aunt voluntarily went to the Bridgeport Police Department to speak with McDaniel. After McDaniel greeted the petitioner and his family, McDaniel brought the petitioner into a private and separate room with no one else present. McDaniel told the petitioner that he was trying to gather some information or evidence. McDaniel also told the petitioner several times that he was not under arrest, was not in custody and was free to leave at any time. The trial court further found that the petitioner understood that he was free to leave at any time.

The trial court found that McDaniel then asked the petitioner whether he had had sexual intercourse with the victim, and the petitioner responded accordingly. At the conclusion of the interview, the petitioner left the police station. The trial court noted that, at the time of the interview, the petitioner was an 18 year old senior in high school with no prior criminal record. The trial court also noted there was no dispute that *Miranda* warnings had not been given.

The trial court concluded the petitioner failed to sustain his burden of proving he was in custody at the time of the interview and denied the Motion to Suppress. The trial court specifically focused on the fact that the petitioner voluntarily came to the police station, that he was told several times he was not under arrest, that he was free to leave at any time, and that the petitioner indicated and acknowledged he understood what he had been told. The trial court therefore concluded that *Miranda* warnings were not required, and reiterated that an individual must be in custody before such warnings must be given.

C. Petitioner's Claim On Appeal And The Decisions Of The Connecticut Appellate Courts

In his appeal to the Appellate Court of the State of Connecticut, the petitioner claimed that the trial court had abused its discretion by denying his Motion to Withdraw his pleas due to counsel's failure to tell him that by entering guilty pleas, he was giving up his right to appeal the denial of his Motion to Suppress. *State v. Turner*, 67 Conn. App. 708, 711, 789 A.2d 1058 (2002). In order to establish an abuse of discretion, the petitioner was required to show that counsel was ineffective because he was constitutionally required to consult with the petitioner regarding his right to appeal. In order to establish that counsel was ineffective, the petitioner was required to show that a rational defendant would have wanted to appeal the denial of the Motion to Suppress. In order to establish that a rational defendant would have wanted to appeal, the petitioner was required to show, in part, that a nonfrivolous claim existed. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029 (2000); *Ghant v. Comm'r of Correction*, 255 Conn. 1, 7, 9, 761 A.2d 740 (2000) (adopting *Roe v. Flores-Ortega*).

The Connecticut Appellate Court reversed the trial court's denial of the Motion to Withdraw, concluding

> Here, the [petitioner] was entitled to be notified of his statutory right to plead nolo contendere and to appeal from the denial of his motion to suppress under the facts of this case. This is so because it is possible that he might have prevailed on his claim that his *Miranda* rights were violated because he believed he was in custody due to his inexperience with the criminal system. Without the confession, a finding of guilty after

> a jury trial would have been problematic, and, therefore, under the analysis set forth in *Ghant*, the [petitioner] had nonfrivolous grounds for an appeal.

State v. Turner, 67 Conn. App. at 714.

After granting the state's petition for certification, a majority of the Connecticut Supreme Court reversed the Appellate Court's decision and concluded that counsel was not ineffective. As a preliminary matter, the Connecticut Supreme Court adopted the criteria articulated by this Court in *Lozada v. Deeds*, 498 U.S. 430, 432, 111 S. Ct. 860 (1991), to be used in evaluating whether a claim is frivolous in the context of an allegation of ineffective assistance of counsel for failure to consult regarding an appeal. *State v. Turner*, 267 Conn. 414, 431-32, 838 A.2d 947 (2004). The Connecticut Supreme Court thus held that in order to establish that an appeal is not frivolous as a matter of law, and that counsel had a constitutionally imposed duty to consult about an appeal, a defendant must demonstrate either that: (1) the issue is debatable among jurists of reason; (2) a court could resolve the issue in a different manner; or (3) the question is adequate to proceed further. *State v. Turner*, 267 Conn. at 433. The Connecticut Supreme Court then considered the question of whether an appeal from the denial of the Motion to Suppress would have been frivolous and concluded that "the [petitioner's] interview with the police cannot, as a matter of law, be construed as a custodial interrogation for *Miranda* purposes." *State v. Turner*, 267 Conn. at 435. The Connecticut Supreme Court based its conclusion on this Court's decisions in *Stansbury v. California*, 511 U.S. 318, 114 S. Ct. 1526 (1994), and *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711 (1977). *State v. Turner*, 267 Conn. at 435-41. The Connecticut Supreme Court reiterated that custody is determined by the application of an *objective*, rather than a subjective,

standard and that "*[T]he only relevant inquiry* is whether a reasonable person in the defendant's position would believe that he or she was in police custody of the degree associated with a formal arrest." (Emphasis in original; citations omitted.) *State v. Turner*, 267 Conn. at 439-40. With regard to the petitioner's claim that he was "a novice to police questioning," the Court ruled that "His subjective beliefs about whether he was in fact free to leave have no bearing on whether he was in custody for *Miranda* purposes." *State v. Turner*, 267 Conn. at 439.

Chief Justice William J. Sullivan filed a dissenting opinion based on his disagreement with the proposition that a "reasonable and objective test cannot take into account the defendant's status as an eighteen year old high school student who had recently emigrated to this country and had no prior experience with our legal system." *State v. Turner*, 267 Conn. at 451 (*Sullivan, J., dissenting.*) Chief Justice Sullivan's dissent relied on the Ninth Circuit Court of Appeals decision in *Alvarado v. Hickman*, 316 F.3d 841 (9th Cir. 2002), which was recently overruled by this Court *sub nom Yarborough v. Alvarado*, 541 U.S. ___(June 1, 2004).

REASONS FOR DENIAL OF THE WRIT

A. At The Time Of His Interview, The Petitioner Was Almost 19 Years Old And Factually This Case Does Not Implicate The Concerns Expressed In *Yarborough v. Alvarado*: Therefore, No Basis For Granting Certiorari Exists

In *Yarborough v. Alvarado*, this Court did not foreclose the possibility that age, and in particular juvenile status, could be a relevant factor in determining custody. *See, Yarborough v. Alvarado*, No. 02-1684, slip op. majority op. at 12 (June 1, 2004)

(This Court "has not stated that a suspect's age or experience is relevant to the *Miranda* custody analysis.") Because the petitioner in this case was almost 19 years old at the time of his interview with the police, this case is not an appropriate vehicle to explore whether juvenile status is relevant to a custody determination. In addition, while sharing many factual similarities to *Yarborough*, this case is distinguishable in that it does not contain many of the factors that were of concern to this Court as expressed in the majority and dissenting opinions. Therefore, this case is not worthy of further review.

Although the concurring opinion in *Yarborough* states "there may be cases in which age is relevant," it concludes that because Alvarado was almost 18 years old at the time of his interview, the trial court did not err in failing to explicitly mention Alvarado's age. *Yarborough v. Alvarado*, No. 02-1684, slip op., concurring op. at 1. In addition, the dissenting opinion was greatly concerned with Alvarado's youth. *Yarborough v. Alvarado*, No. 02-1684, slip op., dissenting op. at 5-7. The petitioner in this case, however, was close to the age of 19 at the time of the interview and legally presumed to be beyond parental control.

This Court has recognized that "there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults." (Emphasis in original.) *Thompson v. Oklahoma*, 487 U.S. 815, 823, 108 S. Ct. 2687, 2692 (1988) (*plurality opinion*). This disparate treatment reflects the "judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults." *Thompson v. Oklahoma*, 487 U.S. at 834, 108 S. Ct. at 2698. The dividing line that society has generally drawn between age of minority and adulthood is the age of 18. At that point, "it is thought reasonable to assume that persons have an ability to make, and a duty to bear responsibility for their,

judgments." *In re Stanford*, __ U.S. __, 123 S. Ct. 472, 474 (2002) (*Stevens, J., dissenting*). Having passed the age of majority, the petitioner in this case can no longer benefit from the paternalism extended to juveniles. Therefore, the concerns expressed in the concurring and dissenting opinions with regard to youth as well as parental influence are not implicated in this case.

In addition, this case is similar to *Yarborough* in that it contains the factors which the *Yarborough* majority opined indicated Alvarado was not in custody. This case is distinguishable, however, in that absent are the factors the majority opined could support a determination of custody. After reviewing the well-established principles governing custody determinations, the majority of the *Yarborough* Court concluded that "fair-minded jurists could disagree over whether Alvarado was in custody." *Yarborough v. Alvarado*, No. 02-1684, slip op., majority op. at 10. The factors weighing against a finding of custody were that (1) the police did not transport Alvarado to the police station or require him to appear at a certain time; (2) the police did not threaten or suggest that he would be arrested; (3) Alvarado's parents remained in the lobby suggesting that the interview would be brief; and, (4) Alvarado went home at the conclusion of the interview. *Yarborough v. Alvarado*, No. 02-1684, slip op., majority op. at 10-11. These facts are identical to facts in the instant case, thus supporting the conclusion of the Connecticut Supreme Court that the petitioner was not in custody.

The factors the *Yarborough* Court opined supported a determination that Alvarado was in custody were that (1) the interview lasted for 2 hours, four times longer than the half-hour interview in *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711 (1977); (2) Alvarado was not told he was free to leave; (3) the fact that Alvarado's parents brought him to the police station

made questionable the extent of Alvarado's control over his presence; and, (4) the police denied the request of Alvardo's parents to be present during the interview. *Yarborough v. Alvarado*, No. 02-1684, slip op., majority op. at 11. None of these facts are present in this case. Rather, the interview with the petitioner lasted, at most, between 30 and 45 minutes. The police also told the petitioner, the petitioner testified and the trial court concluded he understood, that he was free to leave. As discussed above, the petitioner was almost 19 years old and therefore no longer presumptively under the control of his father or aunt. Finally, there is no indication that the petitioner or his family asked to be present during the interview and that this request was denied. These facts further support the conclusion of the Connecticut Supreme Court that the petitioner was not in custody.

The petitioner also suggests that a relevant factor in determining custody should be lack of prior experience with law enforcement because of recent immigrant status. That the majority of the Connecticut Supreme Court did not consider the petitioner's prior experience in its custody determination is consistent with the *Yarborough* Court's conclusion that even as a *de novo* matter "the relationship between a suspect's past experiences and the likelihood a reasonable person with that experience would feel free to leave often will be speculative." *Yarborough v. Alvarado*, No. 02-1684, slip op. majority op. at 15.

Moreover, the dissenting opinion in *Yarborough* focused only on juvenile status. In support of its position that consideration of a person's youth should be relevant to the determination of custody, the dissenting opinion did not appear to disavow the importance of maintaining the objective test to "help[ ] keep *Miranda* a workable rule." *Yarborough v. Alvarado*, No. 02-1684, slip op., dissenting op. at 6. Rather, the dissent characterized youth as an objective circumstance that "is not a special

quality, but rather a widely shared characteristic that generates commonsense conclusions about behavior and perception" and therefore concluded that considering age would not complicate the in custody inquiry. *Yarborough v. Alvarado*, No. 02-1684, slip op., dissenting op. at 6. Prior experience with law enforcement, however, is not such a common characteristic applicable to a readily identifiable group and is too dependent upon a varying array of factors. To add prior experience as a factor would render the custody determination unworkable, would undermine "the clarity of [Miranda's] rule," would require police "to make guesses as to [the circumstances] at issue before deciding how they may interrogate the suspect"; *Yarborough v. Alvarado*, No. 02-1684, slip op., majority op. at 13-14, *citing*, *Berkemer v. McCarty*, 468 U.S. 420, 430, 104 S. Ct. 3138 (1984); and would be inconsistent with the view of the majority and dissenting opinions.

Because the petitioner in this case was almost 19 years old at the time of his interview with the police, to the extent that the *Yarborough* decision has left unresolved the issue of whether juvenile status should be a factor in determining custody, this case does not contain the factual basis to explore this issue. In addition, the facts of this case are distinguishable from *Yarborough* in that absent are any factors which would support a determination that the petitioner was in custody and therefore entitled to be given his *Miranda* warnings. Moreover, the Supreme Court of the State of Connecticut properly applied this Court's precedent. Therefore, no basis for granting certiorari exists.

B. Procedurally, The Determination Of Whether The Petitioner Was In Custody Is Not The Dispositive Issue And This Case Is Analytically Similar To *Yarborough v. Alvarado*: Therefore, No Basis For Granting Certiorari Exists

In *Yarbourough*, the dispositive issue was whether the Ninth Circuit Court of Appeals, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, 28 U.S.C. § 2254(d)(1), improperly granted Alvarado's writ of habeas corpus based on its conclusion that the state court adjudications "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Yarborough v. Alvarado*, No. 02-1684, slip op., majority op. at 1, 9-10. The ultimate conclusion reached by the *Yarborough* Court was that the "state court's application of our clearly established law was reasonable." *Yarborough v. Alvarado*, No. 02-1684, slip op., majority op. at 10, 11. This conclusion was based on the *Yarborough* Court's rationale that "The custody test is general, and the state court's application of our law fits within the matrix of our prior decisions." *Yarborough v. Alvarado*, No. 02-1684, slip op., majority op. at 12. The *Yarborough* Court specifically noted that it could not "grant relief under AEDPA by conducting our own independent inquiry into whether the state court was correct as a *de novo* matter." *Yarborough v. Alvarado*, No. 02-1684, slip op., majority op. at 12.

Similarly, the petitioner's case does not present the issue of custody as a *de novo* matter. Rather, like *Yarborough*, the decision below is a result of the application of the analytical framework in the habeas context and the question of whether the petitioner was in custody has not been clearly presented. The

issue in this case is not whether the petitioner was in custody but whether the Connecticut Supreme Court properly concluded that because an appeal from the denial of the motion to suppress would have been frivolous, counsel was not ineffective for failing to discuss an appeal with the petitioner. In light of the doctrine of stare decisis, it would therefore appear that granting certiorari in this case would not advance the development of the law in this area because the ultimate question of whether the petitioner was in custody has not been clearly presented.

In addition, as a practical matter, even if this Court agreed with the petitioner and concluded that he was in custody, this determination would not dispose of the case. Rather, the result would be to permit the petitioner to withdraw his guilty pleas. Once withdrawn, the State of Connecticut would be able to able to go forward and try the petitioner. When the petitioner moved to withdraw his pleas and sought to enter a conditional plea of nolo contendere, the state informed the trial court that the petitioner had given up his right to appeal in exchange for the state recommending a lower sentence. Tr. 6/19/00, p. 10. Moreover, in order for a trial court to accept a conditional plea of nolo contendere, a ruling on the motion to suppress would need to have had a significant impact. *State v. Turner*, 267 Conn. at 424-26. As the state informed the trial court, the granting of the motion to suppress would not have precluded the state from prosecuting the petitioner because he was charged with statutory rape and the victim was available to testify. Tr. 6/19/00, p. 10. Therefore, granting further review and agreeing with the petitioner's claims might not change the result but rather, the petitioner might still ultimately be found guilty of sexual assault in the second degree and risk of injury.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

THE STATE OF CONNECTICUT

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June 17, 2004

No. 03-1448

In The

Supreme Court Of The United States

GARRICK TURNER,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

APPENDIX

CR98-0145635

THE STATE OF CONNECTICUT	:	SUPERIOR COURT
Complainant,	:	GA 2
-VS-	:	OF FAIRFIELD
GARRICK TURNER	:	AT BRIDGEPORT
Defendant.	:	APRIL 14, 2000

(JUDGE'S ORDERS)

BEFORE: THE HONORABLE JOHN TURNER, JUDGE

APPEARANCES:

ASSISTANT STATE'S ATTORNEY

JOSEPH H. HARRY

WILLINGER, SHEPRO, TOWER & BUCCI, P.C.

DONALD SHEPRO, ESQ.

FOR THE DEFENDANT

Gayle Beler,

Court Monitor

THE COURT: The Court would like to begin today by rendering it's decision on the Defendant's Motion to Suppress, dated March 12th, 1999. Before doing so, the Court would just like to state for the record the facts upon which the Court is relying to support its decision in this matter. The facts were produced by the Defendant and the State at yesterday's evidentiary hearing on the Motion to Suppress Statements that were made by the Defendant while in custody and alleged to have been made before he was given his Miranda warning.

The Court finds from the evidence presented that as a result of a telephone call that was made by Detective Mark McDaniel to the Defendant's home that the Defendant, his father and his aunt went voluntarily to the Bridgeport Police Department where they asked to speak with Detective McDaniel. After being greeted by Detective McDaniel, Detective McDaniel took the Defendant into a private and separate room with no one else present and the Defendant was told the following by Detective McDaniel:

1. The Defendant was told that Detective McDaniel was trying to gather some information or evidence as it was described by the Defendant.
2. That the Defendant was not in custody.
3. That the Defendant was free to leave at any time.
4. The Defendant was asked whether he understood that he was free to go at any time. The Defendant answered yes.
5. The Defendant was shown a recording machine and told to talk into it.

The Court also finds that the Defendant was not advised that he had a right to remain silent, that anything that he said could be used against him in a court of law, that he had a right to the presence of counsel or that if he could not afford an attorney that one would be appointed for him.

The Court finds that the Defendant was told several times that he was not under arrest and that he was free to go at any time.

Among the questions that were asked and responded to by the Defendant was whether the Defendant had had sex with the victim. At the conclusion of the interview the Defendant was allowed to, and did in fact, leave the police station. At the time, the Defendant was eighteen years old, a senior in high school and he possessed no prior criminal record.

On the basis of these facts, and the State does in fact conceded [sic] that no Miranda warning was given to the Defendant. However, the protective mandates of Miranda is required and may only be invoked prior to a custodial interrogation. For the Defendant to have been eligible for the protections provided by the Miranda warnings, two things have to be established or satisfied. Those two things are that the Defendant must have been subjected to an interrogation by the police and that the interrogation must have occurred while the Defendant was in the custody of the police. And the Defendant has the burden initially of proving a custodial interrogation.

On the basis of the evidence presented and as found by the Court, the Court is satisfied that the evidence does establish that the Defendant was subjected to an interrogation and by this the Court means, and the Court means only to say, that the Defendant was subjected to expressed questioning by Detective McDaniel which Detective McDaniel should have known was likely to elicit an incriminating response from the Defendant when he asked the Defendant, among other things, whether he had had sex with victim.

Now a custodial interrogation - - and by this, the Court means did the questioning of the Defendant by the police occur

after the Defendant had been taken into custody or was otherwise deprived of his freedom of action in any significant way. Having come to the police station voluntarily, having been told several times that he was not under arrest, that he was free to leave at any time and the Defendant having indicated and acknowledged that he understood, the Court cannot conclude that the statement made by the Defendant was not made at a time when he had been taken into custody or that he was not free to leave. Taking into consideration the totality, that is all of the circumstances surrounding the Defendant's statement to the police, this Court finds that the Defendant failed to meet its initial burden of proving by a preponderance of the evidence that a reasonable person in the position of the Defendant would have believed that he was not free to leave or that he was being deprived of his freedom of action in any way.

Therefore, the Court rules that the statements made by the Defendant were not made while in custody and, therefore, a custodial interrogation requiring a Miranda warning - - for those reasons the Defendant's Motion to Suppress the statements made by the Defendant are denied.

Counsel, the Court is also aware of your contention that even if the Defendant was not in the custody of the police, if there was an interrogation, then Miranda warnings were required. I would, first of all, bring your attention to your motion to suppress which does not claim that, but it does claim that the statements were made while the Defendant was in custody. Secondly, counsel, the Court would just indicate to you that is, in fact, not the law. The law does require that the Defendant be in custody before Miranda warnings are required.

Anything further?

(End of excerpt.)

CR98-0145635

THE STATE OF CONNECTICUT	:	SUPERIOR COURT
Complainant,	:	GA 2
-VS-	:	OF FAIRFIELD
GARRICK TURNER	:	AT BRIDGEPORT
Defendant.	:	APRIL 14, 2000

TRANSCRIPT CERTIFICATION

I, Gayle Beler, Court Monitor for the GA 2 of Fairfield at Bridgeport, do certify that the foregoing transcript is a true and accurate transcription of the official recordings made in said matter.

Dated on the 18th day of April, 2000, in the City of Bridgeport, Connecticut.

/s/ Gayle Beler,
Court Monitor